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1958

Chancery Division

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London
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Aff.	affirmed
Appl.	applied
Appr.	approved
C.	considered
D.	disapproved
Dist.	distinguished
E.	explained
F.	followed
N.F.	not followed
O.	overruled
Q.	questioned
R.	referred to in judgment
Rev.	reversed

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Clark (F. A.) & Son Ltd. *v.* Inland Revenue Commissioners	[1941] 2 K.B. 270; 57 T.L.R. 624; [1941] 2 All E.R. 651; 29 T.C. 49	*Appl.*	2, 10, 13–17, 27, 28, 33–35, 38, 41, 42
Clarke, *In re*	[1901] 2 Ch. 110; 17 T.L.R. 479		881
Clowes, *In re*	[1893] 1 Ch. 214		172
Coates (J. & P.) Ltd. *v.* Inland Revenue Commissioners	[1897] 1 Q.B. 778; 13 T.L.R. 548		684
Coats *v.* Inland Revenue Commissioners	[1897] 2 Q.B. 423; 13 T.L.R. 548		388
Cobb *v.* Cobb	[1955] 1 W.L.R. 731; [1955] 2 All E.R. 696	*R.*	96
Cocks *v.* Manners	L.R. 12 Eq. 574		108
Cohen and Moore *v.* Inland Revenue Commissioners	[1933] 2 K.B. 126	*Dist.*	376, 380 388
Cohen and Moore *v.* Inland Revenue Commissioners	[1933] 2 K.B. 126		682
Collinson *v.* Pattrick	2 Keen 123		378
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Commercial Bank of South Australia Ltd., *In re*	33 Ch.D. 174; 2 T.L.R. 714	*E.*	76, 79, 80

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Consolidated Goldfields of New Zealand Ltd., *In re*	[1953] Ch. 689; [1953] 1 All E.R. 791	*R.*	563
Constantinesco *v.* The King	43 T.L.R. 727; 11 T.C. 730	*C.*	794, 824
Conyngham, *In re*	[1921] 1 Ch. 491; 37 T.L.R. 420	*R.*	474, 475
Coomber *v.* Justices of the County of Berks	9 App.Cas. 61; 2 T.C. 1	*R.*	824
Cooper *v.* Cooper	L.R. 7 H.L. 53	*Dist.*	169, 173, 174, 179, 180
Copeman *v.* William Flood & Sons Ltd.	[1941] 1 K.B. 202; 24 T.C. 53		20
County Hotel and Wine Co. Ltd. *v.* London and North Western Railway Co.	[1918] 2 K.B. 251; [1919] 2 K.B. 29; [1921] 1 A.C. 85; 35 T.L.R. 305; 36 T.L.R. 786		215
Coventry Permanent Economic Building Society *v.* Jones	[1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901		836
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270	*C.*	514, 522–526
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270	*F.*	866, 872, 874, 875
Cox *v.* Bent	5 Bing. 185		837
Cox *v.* Middleton	2 Drew. 209	*R.*	120
Cree *v.* Somervail	4 App.Cas. 648	*Appl.*	549, 553, 555–557
Cricklewood Property and Investment Trust Ltd. *v.* Leighton's Investment Trust Ltd.	[1945] A.C. 221		701
Cunard's Trustees *v.* Inland Revenue Commissioners	[1946] 1 All E.R. 159; 27 T.C. 122	*R.*	819, 820
Cunliffe-Owen, *In re*	[1953] Ch. 545		47
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Curtis Brown Ltd. *v.* Jarvis	14 T.C. 744		800
Customs and Excise Officers' Mutual Guarantee Fund, *In re*	[1917] 2 Ch. 18; 33 T.L.R. 311		308
Daimler Co. Ltd. *v.* Continental Tyre and Rubber Co. (Great Britain) Ltd.	[1916] 2 A.C. 307; 32 T.L.R. 624		21
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Dargie, decd., *In re*	[1954] Ch. 16; [1953] 2 All E.R. 577	*R.*	622
David *v.* De Silva	[1934] A.C. 106; 50 T.L.R. 165	*R.*	535
Davies *v.* Braithwaite	[1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198	*R.*	362
D'Avigdor-Goldsmid *v.* Inland Revenue Commissioners	[1953] A.C. 347; [1953] 1 All E.R. 403		244
Dawson (G. J.) (Clapham) Ltd. *v.* H. & G. Dutfield	[1936] 2 All E.R 232	*R.*	536
de Cordova *v.* Vick Chemical Co.	68 R.P.C. 103; [1951] W.N. 195	*R.*	920
Derry *v.* Peek	14 App.Cas. 337; 5 T.L.R. 625		639
D'Este's Settlement Trusts, *In re*	[1903] 1 Ch. 898	*R.*	631-633
De Trafford *v.* Attorney-General	[1935] A.C. 280; 51 T.L.R. 298	*R.*	526

De Trafford *v.* Attorney-General	[1935] A.C. 280; 51 T.L.R. 298		870
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Dewar *v.* Goodman	[1907] 1 K.B. 612; [1908] 1 K.B. 94; [1909] A.C. 72	*R.*	217
Dewar *v.* Inland Revenue Commissioners	[1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561	*Appr.*	794, 827
Dilke, *In re*	[1921] 1 Ch. 34; 37 T.L.R. 13	*Appl.*	853, 862, 863
Dobell *v.* Hutchinson	3 Ad. & E. 355	*R.*	124
D'Oyly, *In re*	[1917] 1 Ch. 556	*R.*	266
Drages Ltd. *v.* Inland Revenue Commissioners	6 A.T.C. 727		388
Drake, *In re*	[1926] Ch. 559		264
Drive Yourself Hire Co. (London) Ltd. *v.* Strutt	[1954] 1 Q.B. 250		215
Drummond *v.* Attorney-General for Ireland	2 H.L.C. 837		410
Dudderidge *v.* Rawlings	108 L.T. 802	*R.*	586, 600
Dudley and District Benefit Building Society *v.* Emerson	[1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252		790
Duke of Norfolk, *In re*	[1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664	*C.*	866, 874–876
Dunlop Pneumatic Tyre Co. Ltd. *v.* Selfridge & Co. Ltd.	[1915] A.C. 847; 31 T.L.R. 399	*C.*	62, 74
Dunne *v.* Byrne	[1912] A.C. 407; 28 T.L.R. 257		408
Earl Cowley *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270		244
Edinburgh Workmen's Houses Improvement Co. Ltd.	1935 S.C. 56; 1934 S.L.T. 513	*R.*	905
Edwards, decd., *In re*	[1957] Ch. 21; [1956] 3 All E.R. 526	*Rev.*	169
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Edwards *v.* Jones	1 My. & Cr. 226		698
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Escoigne Properties Ltd. *v.* Inland Revenue Commissioners	[1957] 1 W.L.R. 174; [1957] 1 All E.R. 291		388
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Etherington *v.* Carter	[1937] 2 All E.R. 528	*D.*	576, 586, 602, 605, 606, 611, 614
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Farley *v.* Westminster Bank Ltd.	[1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491		408
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Fattorini (Thomas) (Lancashire) Ltd. *v.* Inland Revenue Commissioners	[1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328	*Appl.*	477, 497, 498
Faulconbridge *v.* National Employers' Mutual General Insurance Association Ltd.	33 T.C. 103		780
Federal Bank of Australia, *In re*	[1893] W.N. 46; 62 L.J.Ch. 561	*R.*	78
Fehmarn, The	[1957] 1 W.L.R. 815; [1957] 2 All E.R. 707		727
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Fitzroy *v.* Cave	[1905] 2 K.B. 364; 21 T.L.R. 612		378
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Flower's Settlement Trusts, *In re*	[1957] 1 W.L.R. 401; [1957] 1 All E.R. 462	*R.*	473, 475
Forsey and Hollebone's Contract, *In re*	[1927] 2 Ch. 379		588
Forster *v.* Elvet Colliery Co. Ltd.	[1908] 1 K.B. 629		211
Forth Conservancy Board *v.* Inland Revenue Commissioners	[1931] A.C. 540; 47 T.L.R. 429; 16 T.C. 103	*R.*	830
Freeman *v.* Inland Revenue Commissioners	L.R. 6 Ex. 101		388
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Harris (C. & T.) (Calne) Ltd. *v.* F. S. E. Harris	51 R.P.C. 98; 50 T.L.R. 123	*C.*	137, 143, 144
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Hillier's Trusts, *In re*	[1954] 1 W.L.R. 9, 700; [1953] 2 All E.R. 1547; [1954] 2 All E.R. 59	*R.*	312, 313
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Inland Revenue Commissioners *v.* Butterley Co. Ltd.	[1955] Ch. 453; [1957] A.C. 32; [1956] 2 All E.R. 197; 36 T.C. 411	*C.*	793, 814, 815, 820
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Inland Revenue Commissioners *v.* G. Angus & Co.	23 Q.B.D. 579; 5 T.L.R. 697	*R.*	391
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Inland Revenue Commissioners *v.* James Hodgkinson (Salford) Ltd.	29 T.C. 395		6
Inland Revenue Commissioners *v.* J. Bibby & Sons Ltd.	61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167	*Appl.*	2, 10–13, 15, 16, 29–32, 35–42
Inland Revenue Commissioners *v.* National Book League	[1957] Ch. 488		801
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Inland Revenue Commissioners *v.* Silverts Ltd.	[1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491	*Dist.*	2, 8, 10, 11, 13–17, 24, 32–35, 37, 38
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Knutsford Ltd. S.S. *v.* Tillmanns & Co.	[1908] A.C. 406; 24 T.L.R. 786		590
Kwik Hoo Tong Handel Maatschappij, N.V. *v.* James Finlay & Co. Ltd.	[1927] A.C. 604; 137 L.T. 458		727
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Lambe *v.* Inland Revenue Commissioners	[1934] 1 K.B. 178; 18 T.C. 212	*C.*	794, 828
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Lewal's Settlement Trusts, *In re*	[1918] 2 Ch. 391; 34 T.L.R. 538	*R.*	631
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Long *v.* Millar	4 C.P.D. 450	*Dist.*	111, 125, 126, 128, 129, 134, 135
Longman, *In re*	[1955] 1 W.L.R. 197; [1955] 1 All E.R. 455		508
Lord Advocate *v.* Fleming	[1897] A.C. 145; 13 T.L.R. 216	*R.*	253
Lord Advocate *v.* Inzievar Estates	[1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424	*Appl.*	240, 249, 252–254, 257, 258
Lord Portman *v.* Inland Revenue Commissioners	35 A.T.C. 349		388
Lumsden *v.* Burnett	[1898] 2 Q.B. 177; 14 T.L.R. 403	*Appl.*	923, 927
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Madras Electric Supply Corporation Ltd. *v.* Boarland	[1955] A.C. 667; [1955] 1 All E.R. 753; 35 T.C. 612	*C.*	794, 823
Mair, *In re*	[1909] 2 Ch. 280		508
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Martin *v.* Inland Revenue Commissioners	15 A.T.C. 631; also reported in Sargeant on Stamp Duties, 3rd ed. (1957), p. 350		683
		R.	710, 713, 714, 720
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McGrory *v.* Alderdale Estate Co. Ltd.	[1918] A.C. 503	*R.*	121, 122
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Messager *v.* British Broadcasting Co. Ltd.	[1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L.	*Appl.*	651, 661 662, 663
Metliss *v.* National Bank of Greece and Athens S.A.	[1957] 2 Q.B. 33; [1957] 2 All E.R. 1; affirmed H.L. (sub nom. National Bank of Greece and Athens S.A. *v.* Metliss) [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608	*R.*	754–756

M'Fadden *v.* Jenkyns	1 Phillips 153	*R.*	382, 708, 719, 720
Milletts (Victoria) Ltd. *v.* Northley House Ltd.	[1956] J.P.L. 744; [20 Conv. 507]	*R.*	445
Milroy *v.* Lord	4 De G.F. & J. 264	*R.*	381, 719
Montagu *v.* Browning	[1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601		318
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Moore, *In re*	[1901] 1 Ch. 691	*R.*	108, 109
Mornington Permanent Building Society *v.* Kenway	[1953] Ch. 382; [1953] 1 All E.R. 951		318
Morris's Settlement Trusts, *In re*	[1951] W.N. 412; [1951] 2 All E.R. 528	*R.*	862
Mortgage Insurance Corporation Ltd. *v.* Inland Revenue Commissioners	21 Q.B.D. 352; 4 T.L.R. 710		397
Mosey *v.* Mosey	[1956] P. 26; [1955] 2 All E.R. 391		508
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Nevill *v.* Inland Revenue Commissioners	[1924] A.C. 385; 40 T.L.R. 341		870
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Nocton *v.* Lord Ashburton	[1914] A.C. 932; 30 T.L.R. 602		638
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Northcliffe, *In re*	[1929] 1 Ch. 327	*R.*	871
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Orman Brothers Ltd. *v.* Greenbaum	[1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731; [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610	*R.*	443
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Watts, *In re*	[1931] 2 Ch. 302	*R.*	861
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Wedgwood, *In re*	[1921] 1 Ch. 601	*R.*	266
Welby *v.* Welby	2 V. & B. 187		171
Wells' Trusts, *In re*	42 Ch.D. 646		171
Welsh Hospital (Netley) Fund, *In re*	[1921] 1 Ch. 655	*R.*	312
West Derby Union *v.* Metropolitan Life Assurance Society	[1897] A.C. 647		911
West Ham Union *v.* Edmonton Union	[1908] A.C. 1; 24 T.L.R. 108	*R.*	604
West London Syndicate Ltd. *v.* Inland Revenue Commissioners	[1898] 2 Q.B. 507; 14 T.L.R. 569		683
Westby's Settlement, *In re*	[1950] Ch. 296; 66 T.L.R. (Pt. 1) 515; [1950] 1 All E.R. 479		510
Westminster Council *v.* Southern Railway Co.	[1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322		588
Whatman *v.* Gibson	9 Sim. 196	*R.*	286
Wheatley *v.* Purr	1 Keen 551		379, 698
Whistler *v.* Forster	14 C.B.N.S. 248		216
White *v.* Wilson	1 Dr. 298		858
White's Will Trusts, *In re*	[1955] Ch. 188; [1954] 2 All E.R. 620	*C.*	448, 454, 457
White's Will Trusts, *In re*	[1951] W.N. 152; [1951] 1 All E.R. 528	*R.*	896
Wilkinson's Settlement, *In re*	[1917] 1 Ch. 620; 33 T.L.R. 267	*R.*	107
Williams, *Ex p.*, *In re* Davies	L.R. 7 Ch. 314	*R.*	929
Williams' Trustees *v.* Inland Revenue Commissioners	[1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513	*F.*	877, 888
Williamson *v.* Ough	[1936] A.C. 384; 20 T.C. 194	*R.*	820
Willis, *In re*	[1917] 1 Ch. 365	*R.*	475
Wimperis, *In re*	[1914] 1 Ch. 502	*C.*	43, 51, 52

Woodall *v.* Clifton	[1905] 2 Ch. 257; 21 T.L.R. 581	*C.*	206, 217, 224–227
Woods *v.* Wise	[1955] 2 Q.B. 29; [1955] 1 All E.R. 767	*R.*	845
Woods *v.* Wise	[1955] 2 Q.B. 29; [1955] 1 All E.R. 767	*C.*	315, 325, 327
Woolwich Equitable Building Society *v.* Marshall	[1952] Ch. 1; [1951] 2 T.L.R. 783; [1951] 2 All E.R. 769	*R.*	322
Wright, *In re*	[1954] Ch. 347; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864	*C.*	448, 454, 457
Wright, Layman & Umney Ltd. *v.* Wright	65 R.P.C. 185; 66 R.P.C. 149		139, 911
Yeo *v.* Dawe	1 T.L.R. 506		397
Younghusband *v.* Luftig	[1949] 2 K.B. 354; 65 T.L.R. 397; [1949] 2 All E.R. 72		587
Ystalyfera Iron Co. *v.* Neath and Brecon Railway Co.	L.R. 17 Eq. 142	*Appl.*	330, 340, 341

STATUTES JUDICIALLY CONSIDERED

1601

Charitable Uses Act, 1601 (43 *Eliz.* 1, *c.* 4), *preamble* **C.A. 877**

1837

Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 24 **C.A. 168**

—— —— *s.* 27 **Danckwerts J. 100**

—— —— —— **Roxburgh J. 146**

1845

Lands Clauses (Consolidation) Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 123 **Upjohn J. 329**

1847

Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 21 **Vaisey J. and C.A. 574**

1881

Customs and Inland Revenue Act, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38 (2) **C.A. 239**

1889

Customs and Inland Revenue Act, 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11 (1) **C.A. 239**

1891

Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 13 (1) (4), 56 (2) (4), *Sch. I*, *para.* 1 **Upjohn J. 392**

—— —— *s.* 54 **Upjohn J. 383**

—— —— —— **C.A. 678**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 26 **Divl.Ct. 922**

1894

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended* **Danckwerts J. 513**

—— —— *s.* 2 (1) (*c*) **C.A. 239**

—— —— *ss.* 8 (4), 9 (1), 14 (1) **C.A. 259**

—— —— *ss.* 1, 2 (1) (*b*), (2) (3), *as amended* **C.A. 865**

1910

Finance (1909–10) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74 **Upjohn J. 375**

—— —— *s.* 74 **C.A. 690**

1911

Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 24 (1) **C.A. 650**

1914

Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1 (1) (*g*) **C.A. 81**

—— —— *ss.* 40, 41 **Divl.Ct. 922**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, III, VI* **Harman J. and C.A. 345**

—— —— *Sch. D, rules applicable to Case III, r.* 3 **Upjohn J. 774**

—— —— *Sch. D, Case VI, r.* 2 *and r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*) **C.A. 792**

1925

Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 47 (5) **Harman J. 231**

Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35 **C.A. 877**

Land Registration Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 21), *ss.* 20 (1), 70 (1) (*g*) (*k*) **Danckwerts J. 314**

—— —— *ss.* 20 (1), 27, 70 (1) (*g*) (*k*) **C.A. 831**

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 28 (1) **Wynn-Parry J. 154**

—— —— *s.* 40 **C.A. 110**

—— —— *s.* 53 (1) (*c*), (2) **Upjohn J. 383**

—— —— —— **C.A. 678**

—— —— —— **C.A. 690**

—— —— *s.* 175 (1) **Harman J. 469**

Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 58 (1) **Wynn-Parry J. 154**

Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 33 **Danckwerts J. 504**

—— —— *s.* 53 **Wynn-Parry J. 154**

1929

Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 211, 221 (1), 338 (1), 342 **Roxburgh J. 182**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 46 (1) *and* (2), *as amended* **Vaisey J. and C.A. 574**

1933

Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 35, 44, 57, 61, 76 **C.A. 877**

Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 29 (4) **Vaisey J. and C.A. 574**

1934

Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3 **Upjohn J. 392**

1936

Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21 (1) (9) - - **C.A. 289**

1937

Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV*, *para.* 11 **Wynn-Parry J. and C.A. 1**

1938

Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 4 (1), 8 (*a*) - - - **C.A. 907**

—— —— *s.* 8 (*a*) - **Danckwerts J. 137**

1940

Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 45 **C.A. 42**

1946

Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22 **C.A. 792**

1948

Children Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 12, 15 - - - **C.A. 877**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 135 (1) - - **Wynn-Parry J. 900**

—— —— *s.* 182 - - **Danckwerts J. 670**

—— —— *ss.* 213, 257 (1) - **Roxburgh J. 560**

—— —— *ss.* 245 (1) (2) (*h*), 265, 302, 303 (2) **Wynn-Parry J. 565**

—— —— *ss.* 265, 274, 354 **Roxburgh J. 182**

1949

Coal Industry (No. 2) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 . . **C.A. 792**

Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (1) (5) (6) - - **Danckwerts J. 314**

—— —— *s.* 2 (1) (5) (6) - - **C.A. 831**

Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 9 **Upjohn J. 665**

1952

Finance Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 34 **Wynn-Parry J. and C.A. 1**

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323 - - **Harman J. and C.A. 476**

—— —— *s.* 430 - - - **Upjohn J. 774**

Intestates' Estates Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64), *Sch. I* **Harman J. 231**

1954

Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58), *ss.* 1, 2 (1) (3) **Harman J. 300**

Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 24 - - **Harman J. 437**

Town and Country Planning Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 66 (1) **Wynn-Parry J. 154**

1955

Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 **C.A. 406**

—— —— —— - - - - **C.A. 421**

1956

Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 8 **C.A. 529**

Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, c. 68), *ss.* 6 (1) (2) (3), 7 (2), 8 (3), 9 - - - **Upjohn J. 61**

1957

Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16 **Vaisey J. 788**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Companies (Winding-up) Rules, 1949 (*S.I.* 1949, *No.* 330 (*L.*4)) **Wynn-Parry J. 565**

Copyright Royalty System (Records) Regulations, 1957 (*S.I.* 1957, *No.* 866), *para.* 1 - - - - - **C.A. 529**

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (*S.R. & O.*, 1947, *No.* 806), *Sch.*, *art. II* (1) (*i*) (3): *art. III* (2) (3) - - **Upjohn J. 774**

Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955 (*S.I.* 1955, *No.* 38), *reg.* 10 **Wynn-Parry J. 154**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

S. BERENDSEN LTD. *v.* INLAND REVENUE COMMISSIONERS.

1957
Feb. 5, 6.

Wynn-Parry J.

C. A.

1957
May 23, 24, 27, 28, 30.

Lord Evershed M.R., Morris and Pearce L.JJ.

Revenue—Profits tax—" Controlling interest "—Body corporate a shareholder — Whether register of members sole test of shareholding — Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch.* 4, *para.* 11 —*Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 34.

A company had an issued share capital of 1,000 shares, each of which carried one vote at meetings of the company. The directors of the company between them held 401 of the shares, carrying less than 50 per cent. of the votes at meetings, and a Danish company held 590 shares, carrying over 50 per cent. of the votes. The shareholding of one of the company's directors in the Danish company gave him control of the voting power of the Danish company.

On an assessment to profits tax, it was contended by the Crown that the shares of the Danish company should be added to the shares held by the directors for the purpose of ascertaining whether a controlling interest in the company was held by the directors within the meaning of paragraph 11 of Schedule IV to the Finance Act, 1937, as amended by section 34 of the Finance Act, 1952.

Wynn-Parry J. held that the share register of the company was the sole test in deciding the ownership of shares, and that it was not permissible to go beyond the register to ascertain whether the directors in fact owned any further shares. On appeal by the Crown:—

Held, that where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate; and that, since the

Danish company, the majority shareholder in the English company, was itself controlled by one of the directors of the English company, the directors of the English company had "a controlling interest "therein" within paragraph 11 of Schedule IV to the Finance Act, 1937, as amended by section 34 of the Finance Act, 1952.

British American Tobacco Co. Ltd. v. *Inland Revenue Commissioners* [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49, *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners* [1941] 2 K.B. 270; 57 T.L.R. 624; [1941] 2 All E.R. 651; 29 T.C. 49 and *J. Bibby & Sons Ltd.* v. *Inland Revenue Commissioners,* 60 T.L.R. 369; [1944] 1 All E.R. 548; affirmed sub nom. *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.,* 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167 applied.

Inland Revenue Commissioners v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491 distinguished.

Decision of Wynn-Parry J. reversed.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the commissioners on February 9, 1956, S. Berendsen Ltd. (hereinafter called "the company") appealed against two additional assessments to profits tax made upon it by the Inland Revenue Commissioners for the years ending December 31, 1951, and December 31, 1952, and two original assessments for the years ending December 31, 1953, and December 31, 1954.

The question for determination was whether the company was, at the material times, a company the directors whereof had a controlling interest therein within the meaning of paragraph 11 of Schedule IV to the Finance Act, 1937 (as amended by section 34, Finance Act, 1952).[1] If the directors of the company were held to have such a controlling interest, then, in computing the profits of the company for the purpose of profits tax, deduction for the remuneration of the directors had to be limited in accordance with paragraph 11.

The following facts were proved or admitted: (a) The company was incorporated in 1912 and carried on the business of merchanting agricultural machinery. The issued share capital was £5,000 divided into 1,000 shares of £5 each. At all material times these shares were registered in the following names: Ludwig Elsass 300 shares, Sophus Berendsen A/S 590 shares, P. L. Burgin 1 share, E. Hertel 100 shares, A. Elsass 9 shares. (b) Each share carried one vote at meetings of the company. (c) Sophus Berendsen A/S (hereinafter called "the "Danish company") was a company incorporated in Denmark. The Danish company and E. Hertel owned the shares registered in their respective names beneficially; the remaining shareholders held the shares registered in their respective names as nominees of the Danish company. (d) The directors of the company were, at all material times, Ludwig Elsass, E. Hertel and P. L. Burgin, who between them had registered in their names a total of 401 shares, carrying less than 50 per cent. of the votes at meetings of the appellant company. Ludwig Elsass owned 395 of the 600 issued shares of the Danish company and was thereby entitled to exercise a majority of the votes in the Danish company in general meeting.

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[1] Finance Act, 1937, 4th Sch., para. 11 (as amended by the Finance Act, 1952, s. 34): "In the case of a "trade or business carried on in a "chargeable accounting period by a "company the directors whereof have "a controlling interest therein, the "deduction to be allowed in respect "of the remuneration of the directors ". . . shall not exceed" certain specified amounts.

It was contended on behalf of the company that the total number of its shares registered in the names of its directors carried less than 50 per cent. of the votes at general meetings of the company and, that being so, the company was not controlled by its directors and the appeal should be allowed.

It was contended on behalf of the Inland Revenue Commissioners: (a) That the Danish company's shareholding in the company should be added to the shares held by the directors of the company because one of the directors of the company, Ludwig Elsass, held a majority of the shares in the Danish company and therefore controlled the voting power of the Danish company; (b) that the directors had a controlling interest in the company; (c) that the assessments should be confirmed.

The commissioners gave the following decision in writing on February 23, 1956: "The question for our determination is "whether the company was at the material times a company "the directors whereof had a controlling interest therein within "paragraph 11 (as amended) of Schedule IV to the Finance Act, "1937. . . . we have come to the conclusion that this question "is essentially more similar to the question before the House of "Lords in *British American Tobacco Co. Ltd.* v. *Commissioners* "*of Inland Revenue*,[2] than it is to the question in *J. Bibby &* "*Sons Ltd.* v. *Commissioners of Inland Revenue*.[3] According to

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[2] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49.

[3] 60 T.L.R. 369; [1944] 1 All E.R. 548, C.A.; affirmed 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167, H.L.

1957

S. BERENDSEN LTD. *v.* INLAND REVENUE COMMISSIONERS.

" our understanding of *Bibby*[4] (which we have read in the light " of the judgment of the Court of Appeal in *Commissioners of* " *Inland Revenue* v. *Silverts Ltd.*[5]) the ratio decidendi was that " it is not permissible to look beyond the company's share register " at the persons who may be beneficially entitled to shares, nor " to take into consideration either the character in which the " registered member may hold the shares or what Lord Simonds " . . . described as the ' external control ' to which he may be " amenable. We do not think that we would be acting contrary " to the principle of *Bibby's* case[6] in addressing our minds to " the question whether (without investigating the character in " which the Danish company holds its shares) the directors in " fact (and without the interposition of any trust) control the " company by virtue of the votes conferred by the shares registered in their own names together with those registered in the " name of the Danish company, and in so doing, to take into " consideration the shareholding of one director in the Danish " company itself. We find nothing in *Silverts'* case[7] which " prevents us from considering this question, and we think that " the *British American Tobacco* case[8] requires us both to consider " it and to answer it in the affirmative. For the foregoing reasons " we hold that the company was at all material times a company " the directors whereof had a controlling interest therein; we " dismiss the appeal and we leave the figures to be agreed."

F. N. Bucher Q.C. and *R. Buchanan-Dunlop* for the company. The words " controlling interest " mean voting control, and one must look at the votes validly cast vis-à-vis the company by reference to the share register. The commissioners' decision is challenged on its finding on the cases; they said that they were not acting contrary to *Bibby's* case,[9] but in fact they did do so. They said, moreover, that nothing in *Silverts'* case[10] prevented them from considering whether the directors of the company actually had control by virtue of Elsass's holding in the Danish company, and that the *British American Tobacco* case[11] in fact required them to have regard to it. The company submits that there is no such requirement in the *British American Tobacco* case.[11]

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[4] 60 T.L.R. 369.

[5] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

[6] 29 T.C. 167.

[7] [1951] Ch. 521.

[8] [1943] A.C. 335.

[9] 29 T.C. 167.

[10] [1951] Ch. 521.

[11] [1943] A.C. 335.

An inquiry which looked beyond the register to see who actually exercised control would be intolerable; and if one looks beyond the register, one must look the whole way; there can be no halfway house, and the difficulty would be where to stop, when looking to discover where the actual control lies. [*F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners* [12] and *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* [13] were referred to.] The passage in the judgment of Scott L.J. in *Clark's* case [14] is against the contention of the company, but that case was concerned with a different paragraph in the schedule. In *Bibby's* case [15] Lord Greene M.R. thought that the words "controlling interest" should be given their natural meaning; he was dealing there with the problem as between the beneficial and fiduciary interests; but that is a decision that inquiry should stop at the register. In that case in the House of Lords [16] Lord Russell of Killowen said that the test was the voting power of the company's directors, not their beneficial interest in the company.

[WYNN-PARRY J. The facts do not approach the facts of this case; it was the quality of the holding there, not whether one should go beyond the register.]

It is inherent in the opinions in the House of Lords that the controlling interest was the power to carry a resolution at a general meeting by the exercise of the voting rights as those rights appeared on the register.

In *Silverts'* case [17] the Court of Appeal thought that the ratio decidendi in *Bibby's* case [18] was that in accordance with well-established principles relating to limited companies the question of the rights of membership vis-à-vis the company (such as that of voting control under its regulations) was to be determined by reference, and by reference only, to the share register, beyond which (save possibly in the case of mere nominee shareholders) it was not permissible to look. Where the name on the register is that of a body corporate, the principle involved is the same, though the question posed may be different. On the question whether one may look beyond the name on the register and inquire what are the interests of a body corporate appearing on the register, *Bibby's* case [18] says that one must not, and that the inquiry must stop at the register; and following that case the

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[12] [1941] 2 K.B. 270.

[13] [1943] A.C. 335.

[14] [1941] 2 K.B. 270, 281.

[15] 60 T.L.R. 369.

[16] 29 T.C. 167.

[17] [1951] Ch. 521.

[18] 29 T.C. 167.

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Court of Appeal in *Silverts'* case [19] held that where a bank was registered with a controlling interest, it was not permissible to investigate the character in which the bank exercised those rights. There is no conflict with the *British American Tobacco* case [20]; there the question was whether company A held a controlling interest in company C although that control was exercisable only indirectly through company B. *Clark's* case [21] only occupies a very small part of the reasoning of the Court of Appeal in that case and the *British American Tobacco* case,[22] which was heard with it, and although Scott L.J. said that a controlling interest contemplated such a relationship as brought about a control in fact by whatever machinery it was effected, that case was before *Bibby's* case [23] and *Silverts'* case,[24] where the doctrine that the register was to be the test had been so fully expounded and laid down, and the reasoning of Scott L.J. did not prevent the Master of the Rolls in *Silverts'* case [24] from coming to the conclusion that the register was to be treated as conclusive. The decision of the commissioners was wrong in not observing what was said in *Silverts'* case [24] by the Master of the Rolls. [He also referred to *Inland Revenue Commissioners* v. *James Hodgkinson* (*Salford*) *Ltd.*[25] and *John Shields & Co.* (*Perth*) *Ltd.* v. *Inland Revenue Commissioners.*[26]]

R. O. Wilberforce Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown. The expression "controlling interest" ought to be given the same meaning wherever it appears, that is, the same meaning in paragraph 7 as in paragraph 11 of the schedule. It is not disputed that "controlling interest" has the same meaning in the schedule as it has in other statutes; and it is not a case of reconciling the authorities; there are different kinds of circumstances between the two branches of cases. What is meant by "controlling interest" is largely covered by authority, and there is no question of the reconciliation of the questions where trustees are on the register and where a body corporate is on the register; they are different questions. "Controlling "interest" was defined by Scott L.J. in *Clark's* case [27]; and Viscount Simon L.C. in the *British American Tobacco* case [28] in the House of Lords said that he found it impossible to adopt the view that a person who by having the requisite voting power in a company could make the ultimate decision how and where the business should be carried on was not a person of whom it could be said that he had in this connexion got a controlling interest in the company. It is admitted that in many cases that may be a crude test.

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[19] [1951] Ch. 521.
[20] [1943] A.C. 335.
[21] [1941] 2 K.B. 270.
[22] [1943] A.C. 335.
[23] 29 T.C. 167.
[24] [1951] Ch. 521.
[25] (1949) 29 T.C. 395.
[26] (1950) 29 T.C. 475.
[27] [1941] 2 K.B. 270.
[28] [1943] A.C. 335.

In case of trustees registered as members but liable to submit to the control of beneficiaries one cannot there look at the beneficial interest, but it is an inaccurate way of putting it that one cannot go beyond the register. The position of trustees on the register does not cut across the principles applicable where there are companies on the register. If the name of a company appears on the register of another company, one does not stop at the register when asking who has the controlling interest. A company is a body which has to be controlled; it does not act or vote by itself and one is bound to see who are the persons controlling it and to inquire who would in fact exercise the votes. In either case, whether it is a trustee or a company, it is the voting power which counts.

Where there is a difference between the beneficial interest and the legal interest, as in *Bibby's* case,[29] the court cannot pay regard to those beneficial interests, but in such cases only to those interests which are on the register; but *Bibby's* case [29] does not touch the present case; it is in a parallel line with it, but not in conflict with it. There is no quarrel with that case in respect of the argument relating to trustees, which turns on the question whether beneficial interests should be taken into account. Nor is *Silverts'* case [30] anywhere near this case; it is a sub-branch of the trustee cases, and the only question there was whether a custodian trustee should be brought within the rules relating to ordinary trustees; Romer J. thought that he was a bare trustee, but the Court of Appeal held that a custodian trustee was not a bare trustee, and in deciding that question it held that the test was not whether the trustee could or could not vote according to the beneficial interest which it represented but on the basis of its holding on the register.

In the case of a company one is entitled to see who has control of the votes. The present is a plain case of indirect voting power, and *Clark's* case,[31] where Scott L.J. held that a controlling interest meant such a relationship as brought about control by whatever means it was effected, is a binding authority. It is submitted that the decision of the House of Lords in the

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[29] 29 T.C. 167.

[30] [1951] Ch. 521.

[31] [1941] 2 K.B. 270.

British American Tobacco case [32] also covers this case, but even if that case be distinguishable, *Clark's* case [33] is an independent authority of the Court of Appeal which should be followed in the present case.

Wynn-Parry J. This case raises the question of what is the meaning of the phrase in paragraph 11 of Schedule IV to the Finance Act, 1937, "a company the directors whereof have a "controlling interest therein." That phrase, and particularly that part of it consisting of the words "a controlling interest," has been the subject of consideration before the courts on a number of occasions. I do not propose to consider the relevant cases in chronological order, and I propose first to consider *J. Bibby & Sons Ltd.* v. *Inland Revenue Commissioners* [1] which was considered by all the courts, including the House of Lords.

I will borrow my statement of the point which was raised in *Bibby's* case [1] from the judgment of Evershed M.R. in the later case of *Inland Revenue Commissioners* v. *Silverts Ltd.*[2] He said [3]: "In the *Bibby* case [4] the question was, as in the present "case, whether the directors of the company held a controlling "interest therein. The question arose in fact under section 13 "(9) of the Act of 1939, whereby for the purpose of excess profits "tax, the profits of the company increase or decrease by a "statutory percentage in relation to the capital employed in the "business, and in that case it was in the interest of the company "to show that its directors did hold a controlling interest therein. "The answer to the problem depended upon whether there should "be included as part of the 'controlling interest' shares held "by directors not in their own right but as trustees under "a settlement of the ordinary kind. The House of Lords (again "affirming the decision of this court) answered the question "affirmatively. Lord Greene M.R., who had read the judgment "of the Court of Appeal, indicated that the result would have "been different had the trustees been bare trustees only; that in "such case the 'controlling interest' would be in the beneficial "owner. But the noble Lords in the House of Lords took so "strongly the view that the question of control was to be determined by reference to the situation of the voting power under the

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[32] [1943] A.C. 335.

[33] [1941] 2 K.B. 270.

[1] 60 T.L.R. 369; [1944] 1 All E.R. 548, C.A.; affirmed 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[2] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

[3] [1951] Ch. 521, 527.

[4] 29 T.C. 167.

" company's regulations that they preferred rather to reserve than " to affirm even the exception of a bare trustee."

It is interesting to note the manner in which the *Bibby* case [5] developed. In the Court of Appeal Lord Greene (whose judgment was the judgment of the court) considered the matter from the point of view of what I might conveniently describe as " trust " law " and, towards the end of his judgment, he said [6]: " It " appears to us that, apart from the special case of a bare trustee, " there is no half-way house between an interpretation which " limits the expression to the case of beneficial ownership and " one which includes ownership by trustees, irrespective of the " fact whether or not they also have some beneficial interest in " the shares which give control."

It must follow from the reasoning of Lord Greene M.R. that, in rejecting the argument that any attention should be paid to beneficial interests in the case of a trust, he was, in effect, treating the register of members as the deciding factor, though the emphasis of his judgment is not upon the register, but upon a consideration of what I have described as " trust law." In the House of Lords, however, it emerges from the speech of every one of their Lordships that the emphasis is to be placed on the state of the register.

In the course of his opinion, Lord Russell of Killowen said [7]: " My Lords, I agree with the view of the Court of Appeal. When " the section speaks of directors having a controlling interest in " a company, what it is immediately concerned with in using " the words ' controlling interest ' is not the extent to which the " individuals are beneficially interested in the profits of the " company as a going concern or in the surplus assets in a winding " up, but the extent to which they have vested in them the power " of controlling by votes the decisions which will bind the com- " pany in the shape of resolutions passed by the shareholders in " general meeting. In other words, the test which is to exclude " a company's business from subsection (9) (*a*) and include it in " (9) (*b*), is the voting power of its directors, not their beneficial " interest in the company."

Later he said [8]: " The words ' controlling interest ' mean " ' controlling voting power ': that is the interest in view, not " beneficial interest. As at present advised, I agree with the " Court of Appeal in the view that there is no half-way house " between a construction which restricts the controlling interest

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[5] 29 T.C. 167.
[6] Ibid. 176.
[7] Ibid. 179.
[8] Ibid. 180.

" to shares which are in the absolute beneficial ownership of the " trustees and a construction which includes all shares of which " the directors are registered holders."

Lord Macmillan, in the course of his speech, said [9]: " The " control of a company resides in the voting power of its shareholders. In the respondent company the ordinary shares alone " confer a right to vote at a general meeting. The directors are " the registered proprietors of a majority of the ordinary shares. " It would therefore appear to follow that the directors have a " controlling interest in the company." Later he said [9]: " In " my opinion the Court of Appeal rightly rejected the contention " of the Inland Revenue Commissioners. The question whether " the directors of the respondent company have the control of " it by their voting power as shareholders must, in my view, be " determined by the memorandum and articles of the company " and by the register of shareholders."

Lord Porter said [10]: " My Lords, I have had an opportunity " of reading, and agree with, the opinions of my noble and learned " friends, Lord Russell of Killowen and Lord Simonds. I cannot " doubt that by the expression, ' a company the directors whereof " ' have a controlling interest therein ' is meant a company in " which the directors by means of their shareholding are able to " direct the affairs of the company according to their will."

Lord Simonds said [11]: " What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise " of voting rights to carry a resolution at a general meeting of " the company. Can the directors of the respondent company " by the exercise of their voting rights carry such a resolution? " Yes: for they are the registered holders of more than half the " ordinary shares of the company. Therefore they have a controlling interest in the company."

In *Inland Revenue Commissioners* v. *Silverts Ltd.*[12] Evershed M.R. cited a number of the passages which I have just cited from the *Bibby* case,[13] and he then expressed the view of the Court of Appeal as to what was the ratio decidendi of the *Bibby* case [13] in these words [14]: " In our judgment the ratio decidendi " in *Bibby's* case is that, in accordance with well-established " principles relating to limited companies, a question of the rights " of members vis-à-vis the corporation (such as that of voting " control under its regulations) is to be determined by reference,

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[9] 29 T.C. 167, 181.

[10] Ibid. 183.

[11] Ibid. 184.

[12] [1951] Ch. 521.

[13] 29 T.C. 167.

[14] [1951] Ch. 521, 531.

"and by reference only, to the share register beyond which it "is not (save possibly in the case of mere 'nominee' share-"holders) permissible to look; and not that, in the case of a "trust, the powers and discretions of exercising votes in regard "to shares must be treated as reposing in the trustees without "regard to the terms of the trust or the right of beneficiaries to "direct such exercise."

That language makes it clear beyond doubt that the Court of Appeal in *Silverts'* case [15] were laying down (and, as I see it, intending to lay down as a general proposition following from *Bibby's* case [16]) that in answering such a question as that before me the register of members is conclusive.

The Court of Appeal in that case had to consider two earlier cases which have been analysed before me: they are, first, *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners*,[17] and secondly, *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*.[18] It is essential to bear in mind that the questions in those two cases were different although, as I have said, they were heard together both before Lawrence J. and the Court of Appeal.

Again, for the purpose of stating the facts, I will borrow from the judgment of Evershed M.R. in *Silverts Ltd.*[19] He said: "In the *British American Tobacco* case [20] the question before "the court arose under paragraph 7 of Sch. IV to the Act of "1937, which provides that in the case of a business carried on "by a corporate body there shall, for the purposes of computing "the tax, be included in its profits the profits of other corporate "bodies (not themselves liable to be assessed to the tax) 'in which "'the first-mentioned body corporate has a controlling interest.' "The question was as to the inclusion in the profits of the British "American Tobacco Company of the profits of bodies corporate in "which it held no interest itself but in which (admittedly) the "controlling interest was held by other companies in which in "turn the British American Tobacco Company itself held "(admittedly) a controlling interest. Though the precise prob-"lem differed from that in the present case, it equally involved "the scope and meaning of the formula 'controlling interest'; "and it has been agreed before us that the formula ought to be

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[15] [1951] Ch. 521.

[16] 29 T.C. 167.

[17] [1941] 2 K.B. 270; 57 T.L.R. 624; [1941] 2 All E.R. 651; 29 T.C. 49.

[18] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49.

[19] [1951] Ch. 521, 527.

[20] [1943] A.C. 335.

"treated as having the same sense in all places where it is used "in Sch. IV to the Act of 1937 and where it is used in the relevant "provisions of the Finance (No. 2) Act, 1939, which was the "material Act in the *Bibby* case.[21]

"In the *British American Tobacco* case [22] the House of Lords, "affirming the decision of this court, held that the controlling "interest was none the less in the British American Tobacco "Company because it was held, as it were, at a remove. 'I "'find it impossible,' said Viscount Simon,[23] with whom all the "other noble Lords concurred, 'to adopt the view that a person "'who (by having the requisite voting power in a company "'subject to his will and ordering) can make the ultimate "'decision as to where and how the business of the company "'shall be carried on, and who thus has in fact control of the "'company's affairs, is a person of whom it can be said that "'he has not in this connexion a controlling interest in the "'company.'"

Evershed M.R. was examining the *British American Tobacco* case [24] and the *Bibby* case,[25] because, as he said in an earlier passage of his judgment, at first sight those two decisions presented a problem requiring reconciliation. Then he said [26]: "The "solution of the present question depends on the proper method "of reconciling the *British American Tobacco* [27] and *Bibby* [28] "cases, or, perhaps more accurately, upon the correct apprecia-"tion of the scope of those decisions."

Having examined the two cases, he came to this conclusion [29]: "In our opinion, this result involves no conflict with the *British "American Tobacco* case.[30] Although (as already stated) the "formula 'controlling interest' ought to be treated as being used "in the same sense in both the Act of 1937 and of 1939, namely, "in the ordinary sense of the English language, yet (as observed "by Romer J.) the questions posed in the *British American "Tobacco* case [30] and in the *Bibby* case [31] were different. In "neither case was the question the general one 'who controls "'the company?' In the *British American Tobacco* case [32] the "question was whether (in the ordinary and proper sense of the "words) company A held a controlling interest in company C, "though the control was exercised not directly but indirectly

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[21] 29 T.C. 167.
[22] [1943] A.C. 335.
[23] Ibid. 339.
[24] Ibid. 335.
[25] 29 T.C. 167.
[26] [1951] Ch. 521, 526.
[27] [1943] A.C. 335.
[28] 29 T.C. 167.
[29] [1951] Ch. 532.
[30] [1943] A.C. 335.
[31] 29 T.C. 167.
[32] [1943] A.C. 335.

"through the agency of company B. If the question were raised "under some other taxing provision 'Has company B a controlling interest in company C?', an affirmative answer to that "question might be given consistently with the affirmative "answer to the first question in the *British American Tobacco* "case.[33] So in the *Bibby* case[34] and in the present case the "question 'Have the directors a controlling interest in the "'company?' falls to be answered, aye or no, without regard to "the possible question (if asked) whether some other person or "body has (indirectly) a controlling interest in the same "company."

That is a conclusion which quite clearly binds me, because I am concerned with the answer to the same sort of question as had been raised in the *Silverts'* case,[35] and there only remains for consideration, therefore, the case of *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners.*[36] It is necessary to consider that case because, at first sight, at any rate, it appears to be a decision which, taken literally, would conclude the matter in favour of the Crown and against the taxpayer.

Again for convenience I will borrow from the judgment of Evershed M.R. in *Silverts'* case[37] for the purpose of showing what was the problem in *F. A. Clark & Son Ltd.*[38] He said[39]: "We referred earlier in this judgment to the case of *F. A. Clark* "*& Son Ltd.* v. *Inland Revenue Commissioners.*[40] Although "*Clark's* case[40] was heard and decided in the Court of Appeal "with the *British American Tobacco Company* case,[41] the "question to be determined was (as in the present case) whether "the directors of the company held a controlling interest therein "within the meaning of paragraph 11 of Sch. IV to the Act of "1937, and not (as in the *British American Tobacco* case[41]) "whether, under paragraph 7 of the same schedule, a body "corporate held a controlling interest in another body corporate "not itself subject to the tax imposed by the Act.

"The facts were that certain shares which were at all material "times registered in the names of two directors of the company "had been held in fact upon trust for one of the directors for "life and subject thereto for the other of them absolutely. The "two directors had then sold their respective interests in the

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[33] [1943] A.C. 335.
[34] 29 T.C. 167.
[35] [1951] Ch. 521.
[36] [1941] 2 K.B. 270.
[37] [1951] Ch. 521.
[38] [1941] 2 K.B. 270.
[39] [1951] Ch. 532, 533.
[40] [1941] 2 K.B. 270.
[41] [1943] A.C. 335

" shares to another company (the 'Phoenix' company) so that " the Phoenix company became absolutely entitled to the shares. " The two directors between them held (admittedly) a controlling " interest in the Phoenix company. As part of the sale agree- " ment, the two directors undertook to execute such transfers of " the shares as the Phoenix company might require so as to vest " in the Phoenix company the legal estate in the shares. But " the shares in fact (as already stated) remained at all material " times registered in the names of the two directors, who may " accordingly be said to have been bare trustees thereof for the " Phoenix company.

" The Clark company sought to maintain (as do Silverts Ltd. " in the present case) that the directors did not have a controlling " interest in the company; and the argument for the company " rested on the assertion that, in the circumstances of the case, " the control was in the Phoenix company and that no regard " should be paid to the fact that the Phoenix company was itself " controlled by the two directors. This court rejected that argu- " ment, holding (as in the *British American Tobacco* case[42]) that " the control in fact lay with the directors. According to the " judgment of Scott L.J.[43] the phrase 'controlling interest' 'con- " 'templates . . . such a relationship as brings about a control " 'in fact—by whatever machinery or means that result is " 'effected.' "

Then Evershed M.R. made this comment on *F. A. Clark & Son Ltd.*[44, 45]: " But the Phoenix company was not on the " register. The directors were. No point appears to have been " made in the argument of that essential fact. Had the point " been made the result would indeed have been, in our judgment, " the same. In the circumstances, the case can bring no com- " fort or support to either side in the present case."

Turning back to the judgment of Scott L.J. in the two cases of *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners*[46] and *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[47] it will be observed that of the four pages which his judgment occupies in the report three are devoted to the case of the *British American Tobacco Co.*,[47] the position of which has been so clearly considered by the Court of Appeal in the *Silverts'* case.[48] It is only on the last page of the judgment that he considers the appeal of *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners*,[49] saying that it was heard in both courts with the appeal of the British American Tobacco Co. Ltd. because it, too, depended on the meaning of the phrase " controlling interest."

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[42] [1943] A.C. 335.
[43] [1941] 2 K.B. 281.
[44] Ibid. 270.
[45] [1951] Ch. 521, 533.
[46] [1941] 2 K.B. 270.
[47] [1943] A.C. 335.
[48] [1951] Ch. 521.

Later in his short remarks on this case, he said that the case was heard by different commissioners from those who heard the *British American Tobacco Company's* case, and they [50] " decided " that the two directors had not such a ' controlling interest ' in " the company. There is no dispute about the facts, and the " issue depends on a pure question of law. It is the same " question as in the *British American Tobacco Company's* case, " except that the phrase ' controlling interest ' is applied to " directors who control the company, instead of to one company " controlling another. Lawrence J. could find no sufficient legal " ground for giving the phrase one meaning in paragraph 7 and " another in paragraphs 4 and 11, and I agree with him. In " each case the decision must depend on the meaning of the " phrase. In my opinion it contemplates, when standing in the " context of any one of the three paragraphs, such a relationship " as brings about a control in fact, by whatever machinery or " means that result is affected. This appeal also must be dis- " missed." That was the judgment in which the other members of the court concurred.

It is not, perhaps, an easy task for a judge of first instance to decide how to deal with the problem with which I am faced, having regard to the explanation of the *British American Tobacco* case [51] which is set out in the judgment of Evershed M.R. in the later case of *Silverts Ltd.*[52] and the expression by Scott L.J. in *Clark's* case [53] that the phrase when standing alone in the context of any one of the three paragraphs means the same.

It is perfectly clear that on the analysis of the *British American Tobacco Company's* case [54] by Evershed M.R. that that case has nothing to do with the problem with which I am faced today; and the position is that similar problems were raised in *Clark's* case,[55] *Bibby's* case,[56] *Silverts'* case [57] and in the case before me. I have the passage to which I have referred in Evershed M.R.'s judgment commenting on the position which in fact

[49] [1941] 2 K.B. 270.
[50] Ibid. 281.
[51] [1943] A.C. 335.
[52] [1951] Ch. 521.
[53] [1941] 2 K.B. 270, 281.
[54] [1943] A.C. 335.
[55] [1941] 2 K.B. 270.
[56] 29 T.C. 167.
[57] [1951] Ch. 521.

obtained in *Clark's* case,[58] namely, that the Phoenix company was not on the register and the directors were. I also have to take into consideration the fact that *Clark's* case [58] preceded *Bibby's* case.[59] I do take into account the point that Mr. Wilberforce made that in their statement of their decision the commissioners did refer to the fact that on December 23, 1937, the Phoenix company became the registered holder of the shares in question. At the same time I cannot help taking the view that the doctrine that the register is to be the sole test had not been developed at the time of *Clark's* case [60] as it was so very clearly developed in the House of Lords in *Bibby's* case.[61] It appears to me that I should be going against the trend of modern authority if I were to take what appears to me to be a narrow view and found my decision upon the latter part of the judgment of Scott L.J. in *Clark's* case.[62]

In the course of his judgment in *Silverts'* case [63] Evershed M.R. said this [64]: "Mr. Pennycuick, pinning himself to the "*Bibby* decision,[65] says that (save for the possible case of a bare "trustee) the matter is concluded by reference to the share "register, subject only to this (and he claims so to 'reconcile' "the *British American Tobacco* [66] and *Bibby* [67] cases) that where "the registered shareholder is a body corporate, you may, at "any rate for certain purposes, look beyond the register and "seek the individuals who themselves control that body "corporate."

If, of course, that proposition were to be accepted, it would remove any conflict there may be between *Clark's* case [68] and *Silverts'* case,[69] and, indeed, *Bibby's* case,[70] but, having regard to the passage which I have read and also again adverted to where Evershed M.R. commented upon the facts in *Clark's* case,[71] I think that I must come to the conclusion that the Court of Appeal did not accept the proviso which Mr. Pennycuick was putting forward as part of his proposition. Faced as I am with this difficulty created by the apparent conflict between *Silverts'* case [72] following *Bibby*,[73] on the one hand, and the judgment of

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[58] [1941] 2 K.B. 270.
[59] 29 T.C. 167.
[60] [1941] 2 K.B. 270.
[61] 29 T.C. 167.
[62] [1941] 2 K.B. 270, 281.
[63] [1951] Ch. 521.
[64] Ibid. 529.
[65] 29 T.C. 167.
[66] [1943] A.C. 335.
[67] 29 T.C. 167.
[68] [1941] 2 K.B. 270.
[69] [1951] Ch. 521.
[70] 29 T.C. 167.
[71] [1941] 2 K.B. 270.
[72] [1951] Ch. 521.
[73] 29 T.C. 167.

Scott L.J. in *Clark's* case,[74] on the other, and bearing in mind that Scott L.J dealt with the problem in *Clark's* case [74] at the end of his judgment on the *British American Tobacco Company's* case [75] which raised a totally different problem, I come to the conclusion that I have to follow the judgment of the Court of Appeal in *Silverts Ltd.*[76] and to accept as of general application the proposition that, in answering a question such as that which is raised before me, the register ought to be treated as conclusive and that I ought not to go behind it. There is no question in this case of any attempt at tax evasion; that situation is expressly provided for by section 32 of the Finance Act, 1951.

For those reasons, in my view this appeal succeeds.

Appeal allowed.

I. G. R. M.

The Crown appealed.

R. O. Wilberforce Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown. The authorities fall into two groups: (a) the line of *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*,[1] in which it was held that "director-" controlled" was wide enough to cover the case of control of a third company through an intermediate company, and (b) the trustee type of case where the question was whether it was legitimate to look at the beneficial interests, or whether only the trustees on the register should be counted. It was held in *J. Bibby & Sons Ltd.* v. *Inland Revenue Commissioners* [2] that regard should be had only to the register. Lord Greene M.R. indicated that the case of a bare trustee might be excepted but he did not express a final view on that point. Wynn-Parry J. in the present case followed the second line of cases. It is submitted that if there is any divergence the first group is more directly in point, but it is not conceded that there is any conflict; the cases are dealing with different questions.

It must be assumed, unless the contrary is shown (and it has not been so shown), that by Danish law the majority shareholders are entitled to control the company in general meeting.

Bibby's case [2] was decided, not under the profits tax legislation, but under the Finance (No. 2) Act, 1939, which imposed excess profits tax. In section 13 (9) of that Act the same expression " the directors whereof have a controlling interest therein " is used. It is not suggested that there should be a different interpretation of these words in the two Acts. Under that provision it was in the taxpayer's interest to show that the company was director-controlled. *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners* [3] arose under paragraph 2, and is, perhaps, the closest case to the present. In that case the Court of Appeal said that the principles of construction must be the same as regards the meaning of " controlling interest " in both paragraphs 7 and 11. The facts of *Clark's* case [3] are not very clear and appear to have been misstated by the Court of Appeal in *Inland Revenue Commissioners* v. *Silverts Ltd.*[4] Up to December 23 the persons on the register of the company were trustees, and two of them were directors of Clark's company, but thereafter until the end of the year the Phoenix company was on the register and that company was controlled by the directors of Clark's. In that case both Lawrence J. and the Court of Appeal rejected the contention that regard should be had only to the company's register.

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[74] [1941] 2 K.B. 270.
[75] [1943] A.C. 335.
[76] [1951] Ch. 521.

[1] [1943] A.C. 335.
[2] 29 T.C. 167.

In *Silverts'* case [4] Evershed M.R. rightly said that *Clark's* case [5] was not in point and that *Bibby's* case,[6] so far as that case was concerned, stood alone. *Bibby's* case [6] decided that it is the voting rights that matter, not the beneficial interest. The case was not concerned with voting power. Reference was made to the *British American Tobacco* case [7] and it was not sought to put any limitation on it. It would be a misapplication of the decision in *Bibby's* case [8] to say that it decided that regard should only be had to the register in every case. The House of Lords was of opinion that the directors were masters of the voting power and it was not relevant to inquire whether their opinion was swayed by extraneous obligations imposed by the terms of a trust.

The vital question is simply, where does one find control? The directors may be another company, a persona ficta. It may be that in such a case the proper question would not be, " who " controls the company? " but whether the company was one in which the directors had a controlling interest. The House of Lords did not regard *Bibby's* case [8] and the *British American*

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[3] [1941] 2 K.B. 270.
[4] [1951] Ch. 521.
[5] [1941] 2 K.B. 270.
[6] 29 T.C. 167.
[7] [1943] A.C. 335.
[8] 29 T.C. 167.

Tobacco case [9] as really touching each other at all. The expression is not "controlling shareholding" but "controlling interest." It is meant to cover both the case of the person who has the right to issue orders and the person who controls that person.

Clark's case [10] is the closest to the present case; it did not go to the House of Lords, but in the Court of Appeal it was said that the question involved in that case and the *British American Tobacco* case [11] was the same, and the latter did go to the House of Lords. *Shields (John) & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners* [12] was again a case under the excess profits legislation and is of no assistance except that in that case *Bibby's* case [13] and the *British American Tobacco* case [14] were treated not as only consistent but as confirming each other. *Silverts'* case [15] was a case of a custodian trustee and the court was not concerned with the question in issue here. The decision is not in point.

Wynn-Parry J. said that *Bibby's* case [16] laid down a general principle that the register should be treated as the vital test of control, but that approach was wrong, for *Bibby's* case [16] was decided against the general background of the *British American Tobacco* case.[17] It is noteworthy that two of the Lords who were concerned in the later case had concurred with Viscount Simon in the earlier one. *Bibby's* case [18] was only concerned with the question whether when directors were on the register as trustees it was necessary, if their shares were to count, for them to be also beneficiaries. The court decided that it was not necessary. When a company is on the register one must look through the register and find out who controls that company. If it be found that the directors have shares in the intermediate company, then it is necessary to ask whether they have a controlling interest within the meaning of the Act. It has not yet been decided whether account should be taken of nominee shares; it seems that it must be so, but that is not in issue in this case.

A controlling interest means, in effect, control by being registered as a shareholder. On the authorities: the *British American Tobacco* case [19] decided that "controlling interest" as used in paragraph 7 is not limited to registered shareholding. *Clark's* case [20] was direct authority under paragraph 2 and it

[9] [1943] A.C. 335.
[10] [1941] 2 K.B. 270.
[11] [1943] A.C. 335.
[12] 1950 S.C. 441.
[13] 29 T.C. 167.
[14] [1943] A.C. 335.
[15] [1951] Ch. 521.
[16] 29 T.C. 167.
[17] [1943] A.C. 335.
[18] 29 T.C. 167.
[19] [1943] A.C. 335.
[20] [1941] 2 K.B. 270.

binds this court. Wynn-Parry J. may have been misled by the misstatement of the facts of that case in *Silverts'* case [21] into thinking that *Clark's* case [22] had decided something other than it had in fact decided. In truth it decided that control through the Phoenix company gave control of the company, and that is precisely this case. Nothing said in *Bibby's* case [23] or *Silverts'* case [24] really affects the position, for they are dealing with different questions. Alternatively, if there is any inconsistency, the line of the *British American Tobacco* case [25] and *Clark's* case [26] should be preferred.

Sir Reginald Hills following. In the ordinary business sense this company was director-controlled, for the directors controlled it in reality by their voting power. Lord Greene M.R. insisted in *Bibby's* case [27] in the Court of Appeal that the words should be given their ordinary meaning.

F. N. Bucher Q.C. and *R. Buchanan-Dunlop* for the company. On the authorities, if the reasoning in *Clark's* case [28] is well-founded, the company must fail. The slips in stating the facts of that case in *Silverts'* case [29] do not affect the soundness of the decision. Although only two-thirds of the persons on the register happened to be directors before December 23, it made no difference, for they had to act unanimously as trustees.

It is wrong to approach paragraph 11 on the footing that it is dealing with an abuse or with the case of extravagant remuneration. It is not to be presumed that directors will vote remuneration contrary to the company's interest. [Reference was made to *Copeman* v. *William Flood & Sons Ltd.*[30]] Paragraph 7 brings in business income. It deals with the case where a company draws income from another company. This paragraph is asking whether the taxpayer controls some other company. Then it is necessary to look at the constitution of that outside company to see whether the taxpaying company controls it. The business income must be brought in to the exclusion of the private income. If the same persons are directors as well as shareholders, paragraph 7 applies a statutory scale. It is submitted that the reasoning in *Clark's* case [31] cannot stand with the *Bibby* case.[32]

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[21] [1951] Ch. 521.
[22] [1941] 2 K.B. 270.
[23] 29 T.C. 167.
[24] [1951] Ch. 521.
[25] [1943] A.C. 335.
[26] [1941] 2 K.B. 270.
[27] 29 T.C. 167.
[28] [1941] 2 K.B. 270.
[29] [1951] Ch. 521.
[30] [1941] 1 K.B. 202; (1940) 24 T.C. 53.
[31] [1941] 2 K.B. 270.
[32] 29 T.C. 167.

The person who controls the shares in the name of the Danish company is not entitled to exercise the voting power of that company. It does not necessarily follow that L. Elsass controlled the Danish company. It does not appear whether he is on the board of the Danish company. The onus is on the Crown to show control and prove its case affirmatively. In the *British American Tobacco* case [33] paragraphs 7 and 11 were treated as requiring the same test. The object is to equalize the position, whether profits are taken out by way of dividend or by way of directors' remuneration: *Copeman* v. *William Flood & Sons Ltd.*[34] The object of paragraph 11 is to limit the remuneration of directors controlling a company, so that such remuneration does not exceed 15 per cent. of the profits. The position under sections 12, 13, 14, 17 (1) and 19 (1) and (2) of the Finance (No. 2) Act, 1939, is that companies are grouped and treated as a whole. National defence contribution and profits tax are identical conceptions. In the case of trading with the enemy, the rule was to look to see the characteristics of the shareholders: *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*[35]

Section 32 of the Finance Act, 1940, is dealing with remuneration for services performed. It is submitted that the *Bibby* case [36] applies as well to paragraph 11 as to paragraph 7. The reasoning in that case applies here. Their Lordships there said that the share register was the final test and that should be so in this case. The same reasoning was applied in the *Silverts'* case.[37] The question is not: who does control the company? But, do the directors control the company? The House of Lords laid down in the *Bibby* case [38] that, in ascertaining who controls a company, inquiries should stop at the share register of that company. If there are exceptions to that general principle, it should be for the House of Lords to define them. In this connexion the observations of Lord Greene M.R. in *Silverts'* case [39] are in point. *Clark's* case [40] was rightly decided, since there it was held that the voting power of the directors in the chargeable accounting period gave control.

Lastly, it is submitted that the principle laid down in the *Bibby* case [41] is the only workable principle and should be applied here. It may in some cases favour the Crown, in others the taxpayer.

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[33] [1943] A.C. 335.

[34] 24 T.C. 53, 56.

[35] [1916] 2 A.C. 307; 32 T.L.R. 624.

[36] 29 T.C. 167.

[37] [1951] Ch. 521.

[38] 29 T.C. 167.

[39] [1951] Ch. 521.

[40] [1941] 2 K.B. 270.

[41] 29 T.C. 167.

R. O. Wilberforce Q.C. in reply. "Controlling interest" should be construed in paragraph 11 in the business sense of the term. It was so construed by the House of Lords in the *British American Tobacco* case.[42] The person who has 51 per cent. of the voting power is the person who has control. Who has that voting power is a question of fact. The question whether in this case indirect control through the Danish company is sufficient should be decided by this court and the case should not be sent back for a determination of that company's constitution. Under section 195 of the Companies Act, 1948, the directors' shareholdings have to be disclosed. There may be cases where the control is too remote to operate, but the fact that there is more than one link in the chain of control does not affect the position. Control may be effected through any number of companies. The court is asked to put out of mind other statutory provisions. It is not admissible to construe one Act by reference to another. The only other Act which has a possible relevance is the Finance Act, 1920, with regard to excess profits duty. The Finance Act, 1940, s. 32, the Finance Act, 1945, Sch. VII, the Finance Act, 1947, and the Finance Act, 1951, s. 32, cannot have any bearing on the construction of the Finance Act, 1937. The problem before the court is a straight problem of the construction of paragraph 11 in Schedule IV of the Act of 1937. That paragraph was introduced for the protection of the revenue. The company contends that the *British American Tobacco* case[42] does not apply here. The question is what is meant by looking outside the register. In paragraph 11 cases the register of the taxpaying company is the relevant register. In paragraph 7 cases it is the register of some other company. Once that distinction is remarked, the same question arises: do you look outside the register? The same answer applies in both cases. There is nothing in paragraph 7 or in the *British American Tobacco* case[42] that one should look outside the register. That case is the present case. That is the authority to be applied here. It is not necessary to go beyond it. *Clark's* case[43] was decided on the point whether the directors' interest in an intermediate company controlled the taxpaying company. Reliance is placed on the observations of Lord Russell of Killowen in the *Bibby* case,[44] where he said "controlling interest" means "controlling voting "power." That is what the directors have in this case.

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[42] [1943] A.C. 335.

[43] [1941] 2 K.B. 270.

[44] 29 T.C. 167, 180.

Cur. adv. vult.

May 30. Lord Evershed M.R. The question that calls for our determination is whether the company, S. Berendsen Ltd., is liable in respect of profits tax for the four calendar years and chargeable accounting periods ending December 31, 1954; and that question depends on whether it can be said of the company that it is a company "the directors whereof had a controlling interest "therein" in accordance with paragraph 11 of the Fourth Schedule to the Finance Act, 1937. That paragraph reads as follows: "In the case of a trade or business carried on in any chargeable "accounting period by a company the directors whereof have a "controlling interest therein, the deduction to be allowed in "respect of the remuneration of the directors" is limited as therein stated. It is right to say, because both on behalf of the Crown and of the taxpayer it has been emphasized, that this is not a case in which some attack is made on an extravagant award of directors' remuneration. The question is the one that I have formulated, whether for the purposes of the tax and of the Act the company is one "the directors whereof had a controlling "interest therein" during the relevant period.

The necessary facts for present purposes may be briefly summarized as follows. The company, having been incorporated in 1912, had at all relevant times an issued share capital of 1,000 shares of £5 each. The shares were registered in the following names: Ludwig Elsass, 300 shares; a company incorporated in the kingdom of Denmark known as Sophus Berendsen, 590 shares; P. L. Burgin, 1 share; E. Hertel, 100 shares; and A. Elsass, 9 shares. Of those individuals, Ludwig Elsass, P. L. Burgin and A. Elsass, in other words, all the individuals except Hertel, were stated to hold their shares as nominees of the Danish company, Sophus Berendsen. All the individuals except A. Elsass were directors of the company at the relevant period.

In paragraph 2 of the case it is further stated that Ludwig Elsass owned at all material times 395 of the 600 issued shares of the Danish company and was thereby entitled to exercise a majority of the votes in the Danish company in general meeting.

With those facts in mind, the question posed at first blush would appear to be one easy of answer. If the question were put, let us say, by a man seeking to do business with S. Berendsen

Ltd., or (to take the illustration Sir Reginald Hills took) by a man whose son or nephew was offered a post in the business of S. Berendsen Ltd., "Who controls S. Berendsen Ltd.?" the answer would appear to be fairly plain. It would be: "Ludwig "Elsass," or (alternatively) "Ludwig Elsass and E. Hertel," both being directors of the company.

But it is pointed out that the question, which I have so far posed and answered, namely, "Who controls the company?", is not the question which the court is asked to answer in this appeal, a point which was similarly made in the judgment of this court in *Inland Revenue Commissioners* v. *Silverts Ltd.*[1] The question is: Is this company one the directors whereof have a controlling interest therein? I have referred to paragraph 11 of the Fourth Schedule to the Finance Act, 1937. It may be convenient, before I proceed further, to refer also to the terms of paragraph 7 in that schedule. I am taking the citation from the schedule as it was originally enacted, which deals with the case of income from investments or other property to be included in a given taxpaying company's profits for the purposes of the tax. Paragraph (*b*) includes among such income the following: "in "the case of any other trade or business . . . the profits shall "include all income received by way of dividend or distribution "of profits from any other body corporate in which the first-"mentioned body corporate has a controlling interest and which "is not liable to be assessed to the national defence contribution," which is the name which the profits tax then bore.

Mr. Bucher, in the course of his address, referred us to a number of sections of other Finance Acts in which somewhat similar phrasing, in many cases exactly similar phrasing, occurs, and his citations included a reference to paragraph 13 of Schedule VIII to the Finance (No. 2) Act, 1945, in which Parliament had thought it right to give an extended definition to the word "control." It was a point made by him that, for better or worse, in this Act of 1937 Parliament had forborne from expressing any definition of the vital phrase "controlling interest." I shall not, I hope, be thought to be disrespectful to Mr. Bucher's argument, if I do not refer to these other statutory provisions, for, in my judgment, they do not assist in the solution of the case with which we are presented.

I have stated the question that is posed, and still on its face it would appear not difficult of answer. As a matter of common sense it would seem, if the question were asked "Is this company one the directors whereof have a controlling interest therein?" that the answer would be in the affirmative; for, as I have pointed out, the individual who, so to speak, not only stands behind the Danish company but is also, through the Danish company, its nominee shareholder, is Ludwig Elsass.

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[1] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

At this stage I will dispose of one point which arose during the course of the argument. In my reading of paragraph 2 of the case I recited the statement that Ludwig Elsass, owning 395 out of the 600 issued shares of the Danish company, was thereby entitled to exercise a majority of the votes in the Danish company in general meeting. It was observed that in terms that statement did not go on to say that in the meetings of the English company, the taxpaying company with which we are concerned, it followed that the voice of the Danish company was the voice of Ludwig Elsass. It did not, in other words, go on to state that Ludwig Elsass, in addition to holding a majority of the votes in the Danish company in general meeting, was also entitled, as a director of the Danish company, to will and order how the Danish company, through its nominees, dealt with the affairs of the English company. For my part, I think it was clearly assumed that the shareholding control that Ludwig Elsass had in the Danish company carried with it the consequence that he (Elsass) was the person who spoke on behalf of the Danish company in every relevant sense. I draw that deduction, first, from the way in which the matter was put by the Commissioners of Inland Revenue, when the case came before the Special Commissioners. It was contended on behalf of the commissioners—and I am reading from the case—"that the Danish company's "shareholding in the company should be added to the shares held "by the directors of the company because one of the directors of "the company, Ludwig Elsass, held a majority of the shares in "the Danish company and therefore controlled the voting power "of the Danish company." There was no challenge on the part of the company of that statement, and the conclusion of the special commissioners, which was favourable to the Crown, included this phrase: ". . . The directors in fact (and without "the interposition of any trust) control the company by virtue "of the votes conferred by the shares registered in their own "names together with those registered in the name of the Danish "company, and in so doing, we take into consideration the "shareholding of one director in the Danish company itself."

In my judgment, therefore, it must now be assumed that the position of Ludwig Elsass vis-à-vis the Danish company was, as the Crown contended and as the company did not at any relevant time contest, such that he could control at his will and ordering the voting power in the English company of the Danish company. I observe that in the speech of Viscount Simon L.C. in *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[2] it is stated: "As to what may be the requisite proportion of "voting power, I think a bare majority is sufficient." The sentence is not, of course, directed precisely to the point with which we are here concerned; but Viscount Simon L.C. is, in my judgment, saying that, for the purposes in hand, one who had a bare majority of the voting power of company A must be treated as having the necessary control over that company.

But although the question would appear, as I have stated it and treated it as a matter of common sense, not to present great difficulty, the real problem in the case has arisen because of the effect of certain decided cases; and that problem is, what is the proper guidance which those cases give to this court in determining the present question?

The first of the relevant cases is the *British American Tobacco* case.[2] That was a case in which the problem arose, not under paragraph 11 of this schedule, but under paragraph 7. It was a case in which the British-American Tobacco Company, being itself amenable to the English revenue laws and to the profits tax legislation, had both directly and indirectly majority or "controlling" interests (as the House of Lords held, affirming the decisions of both courts below) in other companies, some of which were incorporated in foreign countries and not, therefore, themselves amenable to the British revenue legislation. To take one case to illustrate all, the English company, the British-American Tobacco Company, owned a certain percentage (say, 56.67 per cent.) in another company, company Y, which itself owned the entire shareholding (100 per cent.) of a third company, company X. Other illustrations could be taken, the point being whether the appellant company, the British-American Tobacco Co. Ltd., held via the intermediary Y a controlling interest in the third company, X, not itself subject to the revenue laws. The view of Lawrence J., before whom the case first came, of this court and of the House of Lords, was that on the facts of the cases, of which I have given an example, it was true to say that the English company did have a controlling interest via the intermediary in the third or foreign company. It is to be noted that both Lawrence J. and Scott L.J. based their conclusion upon the view that the words "controlling interest" were words of ordinary usage to be given a wide connotation, and were not intended to have a limited technical sense, confining their meaning to an interest of a particular legal or equitable character. In other words, the argument that the British-American Tobacco Company could not be said to have a controlling interest over company X, unless it could be shown that the British-American Tobacco Company was itself and beneficially entitled to the requisite majority of the shares in company X, was rejected.

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[2] [1943] A.C. 335, 339; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49.

Both before Lawrence J. and in the Court of Appeal the case of the *British American Tobacco Co. Ltd.*[2] was dealt with at the same time as another case, known as *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners.*[3] In *Clark's* case[3] no appeal was taken to the House of Lords, so that the speeches in the House of Lords must fairly be taken as related to the facts in the *British American Tobacco Co. Ltd.* case.[4] I think it, however, fair to say that, having regard to the previous history of the case, the facts in *Clark's* case[5] cannot have been wholly outside the consideration of their Lordships, and, when their Lordships affirmed the views of the Court of Appeal and of Lawrence J., it must be borne in mind that both those courts had given their judgment in both cases. The significance of that fact is this: that *Clark's* case[5] was a case which arose under paragraph 11 of Schedule IV to the Act of 1937, the paragraph with which we are concerned. Indeed, when I come to deal with *Clark's* case,[5] it does, in my judgment, provide from its reasoning an answer which binds us in the present case. However that may be, I confine myself for the moment to observing that both Lawrence J. and the Court of Appeal took the view that the same principles of construction must be applied as regards the phrase "controlling interest" in both the paragraphs, 7 and 11.

It is sufficient with that premise for me to cite two passages only from the speech of Viscount Simon L.C. in the House of Lords in the *British American Tobacco Co. Ltd.* case.[6] I may say that the other noble Lords were content merely to express their concurrence with Viscount Simon L.C.'s opinion. The first is

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[2] [1943] A.C. 335.

[3] [1941] 2 K.B. 270; 57 T.L.R. 624; [1941] 2 All E.R. 651; 29 T.C. 49.

[4] [1943] A.C. 335.

[5] [1941] 2 K.B. 270.

[6] [1943] A.C. 335.

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as follows[7]: "The word 'interest,' however, as pointed out by "Lawrence J., is a word of wide connotation, and I think the "conception of 'controlling interest' may well cover the "relationship of one company towards another, the requisite "majority of whose shares are, as regards their voting power, "subject, whether directly or indirectly, to the will and ordering "of the first mentioned company. If, for example, the appel-"lants own one-third of the shares in company X, and the "remaining two-thirds are owned by company Y, the appellants "will none the less have a controlling interest in company X if "they own enough shares in company Y to control the latter."

Later Viscount Simon L.C. said[8]: "I find it impossible to "adopt the view that a person who (by having the requisite voting "power in a company subject to his will and ordering) can make "the ultimate decision as to where and how the business of the "company shall be carried on, and who thus has in fact control "of the company's affairs, is a person of whom it can be said "that he has not in this connexion a controlling interest in the "company."

In reading the second passage I have somewhat emphasized the use by Viscount Simon L.C. of the words "a person." In the case before him the "person" was a persona ficta, the British-American Tobacco Co. Ltd.; but I have already referred to the fact that in its earlier stages this case had been tried in the two courts below with *Clark's* case,[9] and it seems to me, at first sight at any rate, that the formula I have read would be applicable, and might be said to have been intended to be applicable, to the case where an individual person was, by having the requisite voting power in a company subject to his will and ordering, able to make all the ultimate decisions in that company's name. But the full effect of that conclusion may be said to have been somewhat qualified by *J. Bibby & Sons Ltd.* v. *Inland Revenue Commissioners*,[10] a case which also went to the House of Lords. At the hearing of that case in the House it is to be noted that two of the noble and learned Lords, Lord Russell of Killowen and Lord Porter, had also participated by their concurrence in the decision of Viscount Simon L.C. in the *British American Tobacco Co. Ltd.* case.[11]

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[7] [1943] A.C. 335, 339.

[8] Ibid. 339.

[9] [1941] 2 K.B. 270.

[10] 60 T.L.R. 369; [1944] 1 All E.R. 548; affirmed sub nom. *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*, 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[11] [1943] A.C. 335.

The *Bibby* case [12] did not arise under the profits tax legislation at all. It arose under the Finance (No. 2) Act, 1939, which imposed excess profits tax. Section 13 (9) of that Act made special provision for arriving at what was called "standard "profits" for the purposes of the excess profits tax in the case of a company (and it will be observed that the words I am about to cite are identical with those appearing in the earlier Act) "the directors whereof have a controlling interest therein."

The relevant facts in the *Bibby* case [12] were that, of its share capital, the ordinary shares alone carried voting rights. There were issued half a million such ordinary shares. The directors of the company held between them in their own right 209,332 of the ordinary shares, less than 50 per cent. of the total; but three of the directors (who were also brothers) were trustees of the marriage settlement of their sister, and in that capacity they were the registered joint holders of a further 57,500 ordinary shares, making, with the 209,332, more than a quarter of a million, and therefore more than half the shares carrying alone the voting rights. The three director trustees had in fact also contingent beneficial interests under the sister's marriage settlement, in that they were entitled to the property subject to the settlement in the event of the sister dying without issue. At all relevant times the sister was still living. It was in this case in the interest of the company to contend that its directors had a controlling interest therein, and counsel for the company founded their contention on the simple proposition that the directors between them had 209,332 plus 57,500 shares registered in their names (as was the fact) and that, as the directors were between them the registered holders of that quantity of shares, it followed that they had a controlling interest in the company. It was the contention of the Crown that that was not so. It was the contention of the Crown that the interest of the three director trustees for this purpose could not count, for they did not have the beneficial interest, the complete beneficial interest, in the shares of which they were trustees, and could not, therefore, vote in respect of those shares exactly as they wished; they must abide by the obligations placed upon them by the trust. The contention, however, of the taxpaying company prevailed both in the Court of Appeal and in the House of Lords. The judgment in this court was delivered by Lord Greene M.R., and he, in brief, based himself on the view that where an individual or two or more individuals were registered shareholders in a company, notwithstanding that they were trustees of the shares in which they were so registered, for the purposes in hand that sufficed. He made the one exception, on which, however, he expressed no final view, of the case of one who was a bare trustee of the shares for a third party.

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[12] 29 T.C. 167.

In the House of Lords somewhat less emphasis was put upon the trust aspect of the matter. It was there held that for this purpose the share register was to be regarded as conclusive, since the share register provided the answer to the question, who controlled the voting rights? The House rejected the contention that, in considering the matter of controlling interest, it was legitimate to pay regard to the quality of the shareholding and to inquire whether the shareholder had an interest in the legal or equitable sense in the shares which he held; that is to say, whether he was beneficially entitled to them. In that respect, as Lord Russell of Killowen expressly stated, he was following and not seeking to distinguish the *British American Tobacco* case [13]; in other words (and I read the decision of the House of Lords as based upon this view), that in the case before it and similar cases the question was determined by answering the question, who were, from the point of view of the company, the unrestricted masters of the voting power? In the view of the House, the answer was that the directors were; for theirs was the will and ordering, when they were exercising the voting powers vested in them, and it was not legitimate to inquire whether that will and ordering was in any way affected by extraneous obligations, which lay upon them under the terms of a trust or otherwise.

I propose to cite two passages from the speech of Lord Russell of Killowen, who said this, after expressing his agreement with the Court of Appeal [14]: " When the section speaks of directors having " a controlling interest in a company, what it is immediately " concerned with in using the words ' controlling interest ' is " not the extent to which the individuals are beneficially " interested in the profits of the company as a going concern or " in the surplus assets in a winding up, but the extent to which " they have vested in them the power of controlling by votes the " decisions which will bind the company in the shape of resolu" tions passed by the shareholders in general meeting. In other " words, the test which is to exclude a company's business from " subsection (9) (*a*) and include it in (9) (*b*) is the voting power " of its directors, not their beneficial interest in the company."

[13] [1943] A.C. 335.

[14] 29 T.C. 167, 179, 180.

Then he paused to observe that in that respect he was following the principles which underlay the conclusions of the House in the *British American Tobacco* case.[15]

Later he said [16]: " Counsel for the appellants,"—the Crown— " at one stage of the argument, suggested that shares registered " in the name of a director but held by him as trustee might be " included in reckoning the controlling interest in cases where " the trustee had also what was described as a predominating " beneficial interest in the shares. For myself I am unable to " appreciate how these supposed different degrees of beneficial " interest, or the existence in the trustees of any beneficial " interest, can affect the question of control. The words " ' controlling interest ' mean ' controlling voting power ': that " is the interest in view, not beneficial interest." Then, though still reserving the question of the purely nominee shareholder, he expressed, I think, perhaps some doubt whether he would have gone as far as this court did in regard to that exceptional case.

I conclude my reference to *Bibby's* case [16] by two short citations from the speech of Lord Simonds. He said [17]: " What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry " a resolution at a general meeting of the company. Can the " directors of the respondent company by the exercise of their " voting rights carry such a resolution? Yes: for they are the " registered holders of more than half the ordinary shares of the " company. Therefore they have a controlling interest in the " company." And again: " My Lords, in my opinion the Crown's " contention cannot be sustained. Those who by their votes " can control the company do not the less control it because " they may themselves be amenable to some external control. " Theirs is the control, though in the exercise of it they may be " guilty of some breach of obligation, whether of conscience or " of law."

It is, of course, upon *Bibby's* case [18] that the taxpayer in the present case has mainly founded himself, because it is, in a sentence, the gist of his argument that *Bibby* [18] decided that in a paragraph 11 case there must be (and I gratefully adopt the short statement of it by Mr. Bucher) a " clean cut at the share " register "; that it is not legitimate for any purpose under paragraph 11 to look beyond the share register and find beyond it the individual, who in this case, it is said, is Elsass, who controls the voting power of the Danish company, which itself holds more than half of the shares of the English company.

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[15] [1943] A.C. 335.

[16] 29 T.C. 167, 180.

[17] Ibid. 184.

[18] 29 T.C. 167.

The next case to which I shall refer at less length is the decision in this court in *Inland Revenue Commissioners* v. *Silverts Ltd.*[19] That was a case which arose under paragraph 11 of the Act of 1937 and where the facts, so far as relevant, were that certain of the shares which had voting rights were registered in the name of the National Provincial Bank Ltd. It appeared that the National Provincial Bank was in fact a custodian trustee under certain trusts, and that the management trustees behind, so to speak, the custodian trustees were certain of the directors. It was therefore contended, and successfully contended in the first court before Romer J., that the custodian trustee, for this purpose, was in the same position as a bare trustee. Accordingly, following the exception indicated by Lord Greene M.R. in *Bibby*,[20] the right answer to the problem was to say that you could neglect the appearance of the National Provincial Bank on the register and for the purpose in hand look to the persons, the management trustees, who were directors. In this court a different view was taken. It seemed to us that in the light of what had been said in the House of Lords, and since we thought that a custodian trustee could not in any case be treated as in the same position as a bare trustee or a mere nominee, it must follow that the ordering of this particular voting power of the shares in question lay with the National Provincial Bank, and that you could not inquire whether, in exercising that voting power, the National Provincial Bank had to observe extraneous obligations or obey the orders of the management trustees.

It is, however, to be noticed that the National Provincial Bank was itself a company controlled by its own shareholders and directors. In the course of the argument in this case the example was put: supposing the custodian trustee had not been the National Provincial Bank but had been, let us say, the X and Y Trustee and Executor Company Ltd., a company of which the sole shareholders and directors were X and Y, directors of Silverts Ltd., would the answer have been the same? On its facts the *Silverts* case[21] is then, in my judgment, distinct from the present on the ground which I have already indicated. The National Provincial Bank was not itself in any sense relevant to our problem controlled by the directors, or any of the directors of Silverts Ltd. At the end of the judgment of the court in *Silverts's* case[21] certain references were made to *Clark's* case,[22] which it will be recalled was dealt with up to this court together with the *British American Tobacco Co.'s* case[23]; and I think that Wynn-Parry J. in the court below may have been somewhat misled by what was said in this court about *Clark's* case[24] in *Silverts*,[25] and not without reason; for I regret to say that the statement of the facts of *Clark's* case[26] made by this court in *Silverts*[27] was erroneous. We made a statement about the effect of *Clark's* case[28] which was per incuriam wrong.

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[19] [1951] Ch. 521.
[20] 29 T.C. 167.
[21] [1951] Ch. 521.

In order to make that intelligible I must go back to *Clark's* case[28] to state its facts. So far as relevant they were these: of the shares which controlled the Clark company a certain number were held by trustees under a trust. Those trustees were three in number, two Clarks (two of the directors) and a third individual named Bessemer, who was not a director at all. It may well be, as Mr. Bucher pointed out, that, in fact, of those three only that one who was first on the register would be in complete control vis-à-vis the Clark company of the votes; and if, as was said, the first on the register was one of the two directors, that would be the consequence. That fact is not alluded to in the judgments, and no point was ever made about it. What did happen, and what was considered in the case, was this: that these three trustees proceeded to sell their trust shares to a company called Phoenix, and beyond a doubt all the shares in Phoenix were held by directors of Clark, so that Phoenix was a wholly controlled company, wholly controlled by directors of Clark. Notwithstanding the sale, no move was made to transfer the shares on the register to Phoenix until eight days before the end of the chargeable accounting period. Throughout the whole of the rest of the period the three trustees remained the registered shareholders, though they were, having regard to the contract for sale, in the position of holding them in equity for Phoenix absolutely. For the last eight days of the chargeable accounting period Phoenix were on the register and, as I have said, there was no doubt that Phoenix was in fact wholly controlled by the Clark directors. It was the conclusion of Lawrence J. and this court in the *Clark* case[28] that since the beneficial interest throughout the first 357 days of the year belonged to Phoenix, the three trustees being during that period bare trustees for them, and since at the end of the period Phoenix was on the register; and that since Phoenix was wholly controlled by the directors, therefore these shares must be treated as being subject to the will and ordering of directors, which led to the conclusion that Clark's was a company the directors whereof had a controlling interest therein.

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[21] [1951] Ch. 521.
[22] [1941] 2 K.B. 270.
[23] [1943] A.C. 335.
[24] [1941] 2 K.B. 270.
[25] [1951] Ch. 521.
[26] [1941] 2 K.B. 270.
[27] [1951] Ch. 521.
[28] [1941] 2 K.B. 270.

I will come back to the language of Scott L.J. It will be seen, however, that on its facts the case is more close to the present case than any of the others which I have mentioned. In *Silverts'* case,[29] however, the following passage appears in regard to *Clark*[30]: " The facts were that certain shares which " were at all material times registered in the names of two " directors of the company had been held in fact upon trust for " one of the directors for life and subject thereto for the other " of them absolutely. The two directors had then sold their " respective interests in the shares to another company (the " ' Phoenix ' company) so that the Phoenix company became " absolutely entitled to the shares. The two directors between " them held (admittedly) a controlling interest in the Phoenix " company. As part of the sale agreement, the two directors " undertook to execute such transfers of the shares as the Phoenix " company might require so as to vest in the Phoenix company " the legal estate in the shares. But the shares in fact (as already " stated) remained at all material times registered in the names " of the two directors, who may accordingly be said to have been " bare trustees thereof for the Phoenix company." Then, after stating the arguments and the reference to the judgment, reading the judgment of the court, I said: " But the Phoenix company " was not on the register. The directors were. No point appears " to have been made in the argument of that essential fact "—which was not in truth a fact at all. " Had the point been made " the result would indeed have been, in our judgment, the same. " In the circumstances, the case can bring no comfort or support " to either side in the present case."

The conclusion was, as I read it, this: that, since the two directors were on the register, it did not matter whether you looked only at their position on the register, or whether you went behind them and, via the Phoenix company, came back to where you started, namely, the same two directors. Stating, therefore, that the *Clark* case[30] gave no comfort to either side we, as it were, eliminated it as a relevant authority, leaving the *Bibby* case[31] standing alone. I think, for my part, that what was said in *Silverts'* case[32] about the *Clark* case[33] does not in any degree affect the conclusion which this court reached in *Silverts's* case[34]; but I think that Wynn-Parry J. may well have been misled by what is there stated and deflected from considering the bearing that *Clark's* case[35] and the reasoning of this court in *Clark's* case[35] properly has upon the conclusion in the present case.

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[29] [1951] Ch. 521, 533.

[30] [1941] 2 K.B. 270.

I now go back to read a passage from Scott L.J.'s judgment in its relation to *Clark's* case.[35] I say "in its relation to *Clark's* "case[35]" because the greater part of Scott L.J.'s judgment was devoted to the *British American Tobacco Co.* case[36]; but there is no doubt that he treated the principles of construction to be applied in both the *British American Tobacco Co.* case[36] under paragraph 7 and in *Clark's* case[37] under paragraph 11 as the same. He stated his reasoning in the following way[38]: "Paragraph 11 is a similar provision, limiting the remuneration of "directors of a company in which they have a 'controlling "'interest.'" Then, after saying that the cases of *Clark*[39] and the *British American Tobacco Co.*[40] were heard by different individuals representing the Special Commissioners, he said[41]: "It is the same question as in the British American Tobacco "Co.'s case, except that the phrase 'controlling interest' is "applied to directors who control the company, instead of to one "company controlling another. Lawrence J. could find no sufficient legal ground for giving the phrase one meaning in "paragraph 7 and another in paragraphs 4 and 11, and I agree "with him. In each case the decision must depend on the "meaning of the phrase. In my opinion, it contemplates, when "standing in the context of any one of the three paragraphs, "such a relationship as brings about a control in fact, by what-"ever machinery or means that result is effected." He had earlier derived his view of the meaning of the word "control" from its definition in, for example, the Oxford Dictionary.

As the Lord Justice referred to Lawrence J., it is perhaps, to complete the matter, useful to see what Lawrence J. had said in the court below. He said this[42]: "It was contended by Mr. "Talbot for the respondents in the first appeal, and by Mr. Tucker "for the appellants in the second," (that is, in both cases for the taxpayers), "that the word 'interest' in these contexts means a "legal or equitable interest of a proprietary nature in the shares "of the company sought to be taxed; and that directors of a company who only had a controlling interest in the company sought "to be taxed by holding a controlling interest in the shares of "another company, which in turn held a controlling interest in "the shares of the company sought to be taxed, had not a controlling interest within the meaning of the above-mentioned "paragraphs." Then he referred to certain authorities, and said: "I have come to the conclusion that the contention of the Crown "is correct. I do not think that it is a proper inference that "because the Finance Act, 1920, mentioned expressly a controlling interest direct or indirect, the legislature, when it spoke "of 'a controlling interest' simpliciter in 1937 meant only a "direct controlling interest."

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[30] [1941] 2 K.B. 270.
[31] 29 T.C. 167.
[32] [1951] Ch. 521.
[33] [1941] 2 K.B. 270.
[34] [1951] Ch. 521.
[35] [1941] 2 K.B. 270.
[36] [1943] A.C. 335.
[37] [1941] 2 K.B. 270.
[38] Ibid. 281.
[39] [1941] 2 K.B. 270.
[40] [1943] A.C. 335.
[41] [1941] 2 K.B. 270, 281.

What is the conclusion as a result of these authorities? In my judgment, they do not disable the conclusion which I have stated as the common sense conclusion, when the problem was posed as I posed it at the beginning of my judgment. It is, I think, clearly laid down that there is no different meaning or significance to be given to these two words "controlling interest" where they occur respectively in paragraphs 11 and 7 of the Schedule. It is quite true, as Mr. Bucher pointed out, that in a paragraph 7 case, the *British American Tobacco* type of case,[43] one's attention is primarily directed to the control as it emerges according to the internal constitution of the company which one is looking at; whereas in the paragraph 11 case, the *Bibby* case,[44] the control is alleged to arise from some source outside the company itself. But that distinction, I think, does not assist for present purposes, and only arises because, as Mr. Wilberforce puts it, in the first case the question is whether the taxpaying company controls some other company, and in the second case the question is, do the directors control the taxpaying company?

With that premise, I then apply to the present case the language, for example, used by Lord Simonds in the *Bibby* case.[44] He used the phrase: "Those who by their votes can control the "company do not the less control it because they may themselves "be amenable to some external control." Who by their votes

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[42] 29 T.C. 49, 61.

[43] [1943] A.C. 335.

[44] 29 T.C. 167, 184.

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control this company? Of course, the phrase as used by Lord Simonds was particularly directed, having regard to the facts of *Bibby*,[44] to the individuals who were supposedly voting. But in the present case, the first answer to the question, "who by "their votes can control?" is perhaps the Danish company; but the Danish company is itself not a person capable of voting save through the instrumentality of an individual.

In my judgment, the result of these decisions may be formulated somewhat in this fashion. The House has laid it down that you cannot ask the question, when the votes are cast, "is the "voice of the voter affected by obligations imposed upon him by "some external control?" One cannot ask, so to speak, has the tune been called by some third party? But you surely can ask and must ask, since the company itself cannot speak, whose is the voice that you hear? I, for my part, see nothing in the language of Lord Simonds's speech or Lord Russell of Killowen's which in any sense runs counter to the validity of that essential question. I have already supposed the case, by way of contrast to the facts in *Silverts'* case,[45] where the custodian trustee happened to be a private company incorporated by two of the directors, all the shares of which were held by two of the directors. In such a case the votes of such a company would in truth be the votes of the directors, their's would be the voice, their's the will and ordering of that company's voting power, and the fact that the company had obligations as a trustee, which were imposed upon it from an external source, would not make it legitimate to consider the interest of that external source. Put the other way, the National Provincial Bank, for the present purposes, votes not with the voice of the management trustees in question but with the voice of its own management, the shareholders and directors controlling. It is no doubt in some degree a fine distinction, and if it were necessary to do so, I would for my part adopt as correct the way in which Mr. Pennycuick is reported as arguing the case in *Silverts* [45] before this court: "Mr. Pennycuick, pinning himself "to the *Bibby* decision,[46] says that (save for the possible case of a "bare trustee) the matter is concluded by reference to the share "register, subject only to this (and he claims so to 'reconcile' "the *British American Tobacco* [47] and *Bibby* cases [48]) that where "the registered shareholder is a body corporate, you may, at any

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[44] 29 T.C. 167, 184.
[45] [1951] Ch. 521, 529.
[46] 29 T.C. 167.
[47] [1943] A.C. 335.
[48] 29 T.C. 167.

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"rate for certain purposes, look beyond the register and seek the "individuals who themselves control that body corporate." I agree: though I do not think that in truth any reconciliation is necessary between the *British American Tobacco Co.*[49] and the *Bibby* cases.[50] In rejecting the test of *beneficial* shareholding interest the one case followed the other. But, where the registered shareholder is a body corporate, you nevertheless may, and indeed must, for certain purposes, look beyond the register; for since the company cannot itself speak you must find out with whose voice it must do so. You may therefore ask, who does control the body corporate by the necessary shareholding interest in it?

Wynn-Parry J. came to the conclusion in the present case that there was a conflict between the basis of the decision in *Clark's* case[51] and *Silverts'* case,[52] and that it was his duty to follow the *Silverts'* case.[52] He said this[53]: "If, of course, that proposition "were to be accepted,"—that is a reference to Mr. Pennycuick's argument from *Silverts'* case[54]—"it would remove any conflict "there may be between *Clark's* case[55] and *Silverts'* case,[56] and, "indeed, *Bibby's* case[57] but, having regard to the passage . . . "where Lord Evershed M.R. commented upon the facts in "*Clark's* case,[58] I think I must come to the conclusion that "the Court of Appeal did not accept the proviso which Mr. "Pennycuick was putting forward as part of his proposition."

Had the judge appreciated that we had misstated in a material respect the facts in *Clark's* case,[58] and therefore really had not properly stated the ratio of Scott L.J.'s decision, he might very likely have come to a different conclusion in the present case. I, of course, appreciate that in so far as in *Clark's* case[58] Scott L.J. was treating the two directors and the third individual as bare trustees, and saying that you must look in such a case beyond the bare trustee to the beneficial owner, he may have gone further than the House of Lords later said they were willing to go. But beyond a doubt Scott L.J. based his view, in part at least, upon the acceptance of the fact that Phoenix, the beneficial owner, a company, was itself controlled by two directors. I think in so far as he did so base his decision, with all respect, he rightly so concluded, and further that we should be bound to follow Scott L.J.'s decision.

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[49] [1943] A.C. 335.
[50] 29 T.C. 167.
[51] [1941] 2 K.B. 270.
[52] [1951] Ch. 521.
[53] Ante 16.
[54] [1951] Ch. 521.
[55] [1941] 2 K.B. 270.
[56] [1951] Ch. 521.
[57] 29 T.C. 167.
[58] [1941] 2 K.B. 270.

One final point was made which may be put in the form: how far does this investigation of the controlling interest in bodies corporate go? My brother Morris put the case in the argument: supposing the majority shares in the Danish company were themselves held by a Norwegian company, and of that company the majority shares were vested in a Swedish company, and so on, until eventually you found one of the directors at the end of an extremely long and complicated chain; it may be that in such a case, to use the picturesque phrase of Mr. Wilberforce, you would have to say that the man at the far end who pulls the lever would pull it in vain, because the mechanism was so complicated that no discernible effect would be seen at the other end of the machine. That is, however, in my judgment, a question of fact which does not arise in the present case. Here Ludwig Elsass, as the Special Commissioners quite clearly intended to find, controlled the Danish company, in the sense that his was the voice with which the Danish company spoke in its capacity as registered shareholder of S. Berendsen Ltd., and, in those circumstances and for the reasons which I have stated, I think that in this case the appeal should be allowed.

Morris L.J. In computing profits for the purposes of profits tax, limits are imposed upon the deductions which may be made in respect of directors' remuneration in the case of a company the directors whereof have a controlling interest therein. In order, therefore, to decide whether those limits applied in this case, it was necessary to pose and also to answer the question: had the directors of S. Berendsen Ltd. got a controlling interest in S. Berendsen Ltd.?

There were three directors, by name Ludwig Elsass, Burgin and Hertel. There were 1,000 shares. Each share had one vote at meetings of the company. To what extent did the three gentlemen have the power of controlling those votes? If there was a resolution at a general meeting of the company, could those three control whether it would be carried or defeated? Ludwig Elsass was the registered holder of 300 shares, Burgin of 1, Hertel of 100, a total of 401 votes. The three had, therefore, direct control over 401 shares and 401 votes. Even if those 401 vote-carrying shares were vested in them as trustees, they could vis-à-vis the company validly cast 401 votes.

In *Bibby's* case [59] Lord Simonds in his speech said: "Those "who by their votes can control the company do not the less

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[59] 29 T.C. 167, 184.

"control it because they may themselves be amenable to some "external control."

Looking further at the share register, it is seen that A. Elsass held nine shares. But he was not a director. The fate of a resolution at a general meeting would depend upon the way in which the remaining 590 votes were cast. The shares were held by the Danish company, and, as the case records, Ludwig Elsass, by owning 395 out of its 600 issued shares, was entitled to exercise a majority of the votes of that company in general meeting. Mr. Bucher agrees that the issue raised in this case would be just the same if the 590 shares were owned by another English company in which Ludwig Elsass held practically all the shares. In such circumstances Ludwig Elsass could bring it about that he would be authorized to act as the representative of the company and to exercise the voting rights of the 590 shares.

In the *British American Tobacco* case[60] the question was whether one body corporate had a controlling interest in another body corporate. It was held that company No. 1 can have a controlling interest in company No. 3 by owning all the shares in company No. 2, which in turn owns all the shares in company No. 3. In the present case the question is whether the three directors had a controlling interest in the company itself, and in my judgment it must be said that Ludwig Elsass had the power of exercising the voting power resulting from the 300 shares in his own name on the register and also the voting power resulting from the 590 shares standing in the name of the Danish company. In the *British American Tobacco* case[60] Viscount Simon L.C. said[61]: "I find it impossible to adopt the view that a person who (by "having the requisite voting power in a company subject to his "will and ordering) can make the ultimate decision as to where "and how the business of the company shall be carried on, and "who thus has in fact control of the company's affairs, is a person "of whom it can be said that he has not in this connexion a "controlling interest in the company."

The view which I have expressed involves no departure from the directions in the *Bibby* case[62] to have regard to actual voting power and not to search for ultimate beneficial interests. But if in seeking an answer to the question: had the directors of S. Berendsen Ltd. got a controlling interest in S. Berendsen Ltd.? it is merely said that 590 shares out of the 1,000 are held by a limited company and no further inquiry is made or is permitted as to the shareholding in that company, then, in my judgment, the task of answering the question posed is not being pursued but is being abandoned.

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[60] [1943] A.C. 335.

[61] Ibid. 339.

[62] 29 T.C. 167.

It cannot be said that there is any conflict between the *British American Tobacco* case [63] and the *Bibby* case,[64] nor, of course, does Mr. Bucher so suggest. He submits that the two cases concerned different topics. He submits that under paragraph 7 the inquiry raised is whether one company has a controlling interest in another, and that a process of looking outwards is involved; whereas he submits that under paragraph 11 a process of looking inwards is involved in that the inquiry is whether the directors of a company concerned control that company itself. But the *British American Tobacco* case [65] lays it down that when it is being investigated whether company No. 1 has a controlling interest in company No. 3, it is not appropriate to end the inquiry after looking at the register of company No. 3 and finding that company No. 1 holds no shares, inasmuch as all the shares are held by company No. 2. It is proper, and indeed necessary, to look at the register of company No. 2. When, on so doing, it is found that all the shares in company No. 2 are held by company No. 1, the answer to the inquiry is revealed.

Similarly, if under paragraph 11 the inquiry is: do A and B and C control company No. 1? it would seem to be pointless and profitless to call a halt upon finding that the register of company No. 1 records that the majority of the shares are held by company No. 2, when an examination of the register of company No. 2 might reveal that all or nearly all of its shares were held by A.

It was submitted by Mr. Bucher that the result reached in the *F. A. Clark & Son Ltd.* case [66] was correct, in that for nearly the whole of the accounting period between April 1 and December 31 the voting rights of the 14,599 shares, which were in the names of the three trustees, were exercisable by F. C. Brown Clark, who was a director. But if this is assumed, it seems clear that the decision in the case involved that it could be said that the two directors of F. A. Clark & Son Ltd. had a controlling interest in that company by reason of their holdings in the Phoenix Co. Scott L.J., in his judgment, said [67]: "It is the same question as "in the British American Tobacco Company's case, except that "the phrase 'controlling interest' is applied to directors who

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[63] [1943] A.C. 335.

[64] 29 T.C. 167.

[65] [1943] A.C. 335.

[66] [1941] 2 K.B. 270.

[67] Ibid. 281.

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"control the company, instead of to one company controlling "another."

In my judgment, the reasoning in the *Bibby* case [68] is not inconsistent with this, and therefore does not overrule the reasoning upon which the decision in the *Clark* case [69] was based. The decision in the *Clark* case [69] and the guidance of the *British American Tobacco* case [70] lead me to the conclusion that the directors of S. Berendsen Ltd. had a controlling interest in the company. Had it been necessary to decide the case uninstructed by authority, this is the conclusion which would have commended itself to me. I find myself also in complete and full agreement with the judgment that has been delivered by my Lord, the Master of the Rolls. I would allow the appeal.

Pearce L.J. I agree with all that my Lords have said, and I have nothing to add.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Denton, Hall & Burgin; Solicitor of Inland Revenue.*

B. A. B.

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[68] 29 T.C. 167.
[69] [1941] 2 K.B. 270.
[70] [1943] A.C. 335.

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May 24, 27;
June 6.

Jenkins and Sellers L.JJ. and Roxburgh J.

In re STRATTON'S DISCLAIMER.
STRATTON AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[1956 S. No. 2134.]

Revenue — Estate duty — Property chargeable — Disclaimer of specific legacies — Disclaimer within five years of death of disclaimant — Resulting benefit to residuary legatees—Liability to estate duty on death of disclaimant—Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 45.

The widow of a testator disclaimed all interest in certain policies of insurance and freehold properties to which she was entitled under the will of her husband, and that property, in consequence, went to her three sons, the residuary legatees. She died within five years of making the disclaimer. The Crown claimed that estate duty was payable on her death by virtue of section 45 (2) of the Finance Act, 1940, in that the disclaimer was "the extinguishment at the expense of the deceased of a debt or "other right . . . in favour of the person for whose benefit the "debt or right was extinguished . . ." within the meaning of those words in the subsection:—

Held, (1) that the widow had a "right" within the meaning of the subsection in respect of the policies and freehold properties bequeathed and devised to her during the period between the death of the testator and the execution of the deed of disclaimer.

(2) That the disclaimer operated as an "extinguishment" of that right.

(3) That such extinguishment was effected "at the expense of" the widow in that she thereby lost the benefit of the specific bequest and devise.

(4) That the extinguishment of the right was "for" the "benefit" of her three sons, and that for this purpose it was not necessary to show that in bringing about or suffering the extinguishment the deceased was actuated by the intent, or purpose or desire of benefiting the persons actually benefited; and that, accordingly, estate duty in respect of the property disclaimed was payable on her death.

In re Parsons [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496 applied.

In re Wimperis [1914] 1 Ch. 502 considered.

Decision of Danckwerts J. [1957] Ch. 132; [1956] 3 All E.R. 862 affirmed.

APPEAL from Danckwerts J.[1]

By his will dated July 16, 1946, Frederick William Stratton made specific bequests to his widow, Fanny Stratton, of 12 policies on his life of £800 each and one policy of £400 in a certain insurance company; and secondly, a specific devise of his freehold houses and premises in Tottenham (which were used in connexion with his business and in which his sons were given certain rights and options) but which, in the event that happened, went to his widow absolutely under an alternative gift. The testator gave his residuary estate in equal shares to his three sons, the plaintiffs in this summons.

The testator died on October 20, 1949, and his will was proved on November 2, 1950.

No assent was made by the executors in favour of the widow in respect of the property devised or bequeathed to her under the will; and by a deed of disclaimer dated May 28, 1951, she declared: "I the said Fanny Stratton do hereby irrevocably "disclaim and renounce all beneficial interest to which I am or

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[1] [1957] Ch. 132; [1956] 3 All E.R. 862.

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"may be entitled under said will in the said policies of insurance "and each of them and the bonuses and additions thereto and "in the said freehold property." The disclaimer recited the gifts in the husband's will and that the widow was desirous of "disclaiming the said gifts and all my interest therewith. . . ." The disclaimer contained no information as to the intention or motive of the widow in making the disclaimer.

She died on June 27, 1953, which was within five years from the date of the disclaimer. She appointed her three sons executors and trustees of her will, which was dated June 29, 1951, and proved by them on August 29, 1953.

The Inland Revenue Commissioners claimed that estate duty became payable on the death of Fanny Stratton in respect of the property disclaimed by her by virtue of section 45 (2) of the Finance Act, 1940.[2]

The combined value of the policies and freehold property for estate duty purposes, if liability were established, had been agreed by the parties at £30,306, and the duty thereon at £4,079 0s. 5d.

The plaintiffs took out a summons to have determined whether by virtue of section 45 (2) of the Finance Act, 1940, a liability for estate duty arose on the death of Fanny Stratton under section 2 (1) (*c*) of the Finance Act, 1894 (as amended by section 59 of the Finance (1909–1910) Act, 1910, and section 47 of the Finance Act, 1946) in respect of the property disclaimed by the deed of disclaimer, dated May 28, 1951, and executed by Fanny Stratton within five years of her death.

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[2] Finance Act, 1940, s. 45: "(1) The creation by a person or "with his consent of a debt or other "right enforceable against him per-"sonally or against property of "which he was or might become "competent to dispose, or to charge "or burden for his own benefit, shall "be deemed for the purposes of the "enactments relating to estate duty, "including this Part of this Act, to "have been a disposition made by "that person, and in relation to such "a disposition the expression 'pro-"'perty' in the said enactments shall "include the debt or right created.

"(2) The extinguishment at the "expense of the deceased of a debt "or other right shall be deemed for "the purposes of the said enactments "to have been a disposition made by "the deceased in favour of the person "for whose benefit the debt or right "was extinguished, and in relation "to such a disposition the expression "'property' in the said enactments "shall include the benefit conferred "by the extinguishment of the debt "or right.

"(3) The proviso to section four "of the Finance Act, 1894 (which "excepts from aggregation property "in which the deceased never had an "interest) shall not have effect in "relation to property passing on the "death of the deceased which consists "of a debt or right or benefit that "is treated as property by virtue of "this section."

Danckwerts J. held that estate duty was payable in respect of the disclaimed property.

The plaintiffs appealed.

Charles Russell Q.C. and *A. J. Belsham* for the plaintiffs. It is of the first importance to bear in mind the nature and effect of a disclaimer. In the case of every gift, whether made inter vivos or by will, there must be a donor and an assenting donee. A donee is always entitled to disclaim a proferred gift. The law presumes that the intended donee has accepted the gift unless there is evidence to the contrary either orally or in writing: Halsbury's Laws of England, 3rd ed., vol. 18, pp. 388, 389; vol. 11, p. 364; 2nd ed., vol. 34, p. 132. As to the right to disclaim, *Townson* v. *Tickell* [3] and *In re Wimperis* [4] show that disclaimer means the refusal of a proferred gift and that the effect of a disclaimer is that the presumption of assent to the gift originally made by the law was wrong and was *always* wrong, that is, that the presumption of assent was negatived ab initio and not from the date of disclaimer. *In re Parsons* [5] is distinguishable from the present case, since it concerned section 5 (2) of the Finance Act, 1894.

If it was the intention of the legislature to bring this particular type of "non act" within the ambit of section 45 (2), the language used in the subsection is most inapt for that purpose. While a person who is proferred a gift may be said to have property in the gift until disclaimer, nevertheless it is a right of property so peculiar and limited in character that it cannot fairly be said to come within the scope of the words "debt or other "right" in the subsection. Curious results would follow if the Crown's argument is accepted. For example, suppose A bequeathes brewery shares to the value of £100,000 to B, an ardent teetotaller, who immediately disclaims the gift; if B were to die within five years of the date of disclaimer, and his own estate amounted to £20,000, duty would be leviable on his estate at the £120,000 rate and not at the £20,000 rate. Similar considerations would arise where a person felt obliged to disclaim a gift because there was attached to it a condition which he was unable or unwilling to fulfil, for example, that he changed his religion; or where a person disclaimed on grounds of conscience, dislike of the donor or dislike of the donor's money.

[3] (1819) 3 B. & Ald. 31, 36, 37.

[4] [1914] 1 Ch. 502.

[5] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

It is to be noted that although section 43 of the Act of 1940 relates to the "disposition and determination of life interests," no attempt is made in that section to tax a life interest which is disclaimed. It would seem strange, therefore, that a disclaimer should come within the somewhat loose language of section 45 (2).

Even if the widow had a "right" within the meaning of the subsection in respect of the property in question between the date of the testator's death and the execution of the deed of disclaimer, the disclaimer did not operate as an "extinguishment" of that right within the meaning of the subsection. If A makes a voluntary settlement on B and B accepts it and then releases his interest, B has "extinguished" a "debt" within the meaning of the subsection. But if B refuses the settlement ab initio, he does not thereby "extinguish" a "debt" nor does he extinguish any "other right." So to hold would lead to the most curious results. Further, the mere refusal to accept a legacy, even if it be apt to describe it as the "extinguishment" of a "debt or other right," it is not at the expense of the deceased. This is an additional pointer to the whole submission that the subsection is not aptly drawn to embrace refusals to accept benefits.

In any event, for this transaction to come within the subsection, there must be shown a conscious intention on the part of the widow to benefit her three sons by virtue of the disclaimer. It is submitted, however, that the court is not entitled to draw inferences of intent to benefit from the mere fact of disclaimer, where the document of disclaimer is itself silent on the subject of motive or reason for disclaiming the interest in question. [Reference was also made to section 11 of the Finance Act, 1900.]

John Pennycuick Q.C. and *E. B. Stamp* for the Crown. The scheme of section 45 (2) is that it specifies a certain type of actual transaction, and then goes on to provide that the actual transaction shall be deemed a certain notional transaction. The characteristics which the actual transaction must have are: (a) there must exist a "debt or other right"; (b) that debt or other right shall be "extinguished"; (c) the extinguishment shall be "at the expense of the deceased."

As to "a debt or other right," the plaintiffs do not pray in aid the ejusdem generis rule and, accordingly, there is nothing in the subsection to cut down the meaning of "right," which is not a term of art and is a word of very wide meaning. From the moment of the testator's death a legatee has a right to have the estate administered and his legacy paid in due course of administration: *per* Sir Raymond Evershed M.R. and Denning L.J. in *In re Cunliffe-Owen.*[6] There is plainly in existence a "right" in a legatee under a will from the moment that the testator dies; it is not a mere expectation but a right.

As to the requisite that the right must be extinguished; when a legatee disclaims a legacy his right is thereby extinguished. As to the third requisite—"at the expense of the deceased"—these words in their context must plainly bear the meaning that Danckwerts J. placed on them.[7] If "expense" meant disbursement, it would be covered by section 2 (1) (*c*) of the Finance Act, 1894, and section 45 (2) would add nothing at all. Section 45 (2) was enacted for the express purpose of including this type of case, where a person by disclaiming gives up a right to put money into his own pocket. In the absence of special circumstances the refusal of a legacy is plainly a detriment to the person refusing or disclaiming it.

The main burden of the plaintiffs' argument has been that, admitted that the three requisites outlined above apply to the subsection, nevertheless the doctrine of relation back operates in the event of a disclaimed interest so that in the eye of the law it is as though the "right" in question was never in the deceased. It is not disputed that the nature of a disclaimer is correctly stated in *Townson* v. *Tickell*,[8] and it is also no doubt true that if a legatee disclaims, the estate has to be administered as from the moment of the testator's death as though the disclaimed legacy had never been given, and, similarly, before 1898 the effect of the disclaimer of a devise was that the legal estate, which in the eye of the law was vested in the devisee until disclaimer, shifted away from him and it was treated as though it had never been in him. But it must be emphasized that this subsection is concerned with *rights*. Between the date of the testator's death and the date of disclaimer a legatee has a "right." The doctrine of relation back is concerned with the legal estate but it does not affect this "right." The widow had such a "right" until she chose to give it up. It is on this aspect of the case that *In re Parsons*[9] is directly in point. The observations of Lord Greene M.R. in that case[10] are fatal to the plaintiffs' contention that the deceased never had a "right." If the legatee in *In re Parsons*[11] was, as the Court of Appeal held, "competent to dispose" of the property before disclaimer,

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[6] [1953] Ch. 545, 560, 562.

[7] [1957] Ch. 132, 143.

[8] 3 B. & Ald. 31.

[9] [1943] Ch. 12.

[10] Ibid. 15.

[11] [1943] Ch. 12.

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ipso facto he must have had a right, for otherwise he would not have been competent to dispose of his legacy.

The Crown's contention can be crystallized by considering the question from the point of view of non-increment of assets in contradistinction to diminution of assets. In the ordinary case of a debt owed by a debtor to a creditor, the debt in the hands of the creditor is a chose in action and as such is an item of property. If the creditor releases the debt he is reducing his assets by parting with that item of property just as much as if he put his hand in his pocket and paid out in cash. The position is similar in respect of an unpaid legacy under a will. The right of a legatee to be paid his legacy is an equitable chose in action: Halsbury's Laws of England, 3rd ed., vol. 4, p. 481. The moment the testator dies the legatee has a right against the estate, an equitable chose in action, and the legatee's assets are thereby increased. If the legatee sees fit to disclaim he destroys that right and his property is brought back into the position it was at the moment before the testator's death.

Danckwerts J. was wrong in holding that for the purposes of the subsection an actual intention to benefit has to be shown. If that were so, such an intent to benefit would have been inserted and expressed in the subsection in relation to the actual transaction. Section 45 (2) does not require actual intention; all that has to be shown in this connexion is the *fact* of "the extinguishment at the expense of the deceased of a debt or other right ..." If intention were made the criterion it would lead to the most capricious results.

If, contrary to the above submission, it be held that the subsection does require an actual intention to be shown, then reliance is placed on the maxim that a person is presumed to intend the natural consequences of his acts: Phipson on Evidence, 9th ed., p. 152. In the present case the testator had given specific legacies to his wife and his residue to his three sons; the natural consequence of the disclaimer of the specific legacies was to increase the residue and thereby benefit the sons. The widow must be presumed to have intended the natural consequences of her disclaimer. [Reference was also made to section 46 of the Finance Act, 1950, and to *In re Wimperis.*[12]]

Russell Q.C., in reply, referred to section 46 of the Finance Act, 1950, *In re Cunliffe-Owen* [13] and *St. Aubyn* v. *Attorney-General.*[14]

Cur. adv. vult.

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[12] [1914] 1 Ch. 502, 509.

[13] [1953] Ch. 545.

[14] [1952] A.C. 15, 16, 32, 41, 43, 57, 60.

June 6. The following judgments were read.

JENKINS L.J. stated the facts and continued: The deed contained no reference to the destination of the policies and freehold property thereby disclaimed, but the effect of it plainly was to bring about a total failure ab initio of the gifts to her of these assets contained in the will, with the result that they fell into residue for the benefit of the three sons as residuary legatees and devisees.

Mrs. Stratton died on June 27, 1953, a date well within five years of the disclaimer. Clearly if she had accepted the gifts made to her by the will and had then within five years of her death transferred the assets comprised in them to her three sons by way of gift, estate duty would have been exigible on her death in respect of such gift by virtue of section 2 (1) (*c*) of the Finance Act, 1894, the provisions incorporated therein of section 38 of the Customs and Inland Revenue Act, 1881, and section 11 of the Customs and Inland Revenue Act, 1889, and the extensions of the liability to duty first to gifts made within three years of the death by the Finance (1909–10) Act, 1910, and then to gifts made within five years of the death by the Finance Act, 1946. But instead of proceeding by way of acceptance and transfer, Mrs. Stratton (as one would expect in the circumstances) preferred to achieve substantially the same result by the simpler and cheaper method of a disclaimer, which did not transfer her interest to the three sons by way of gift but destroyed her interest with the legal consequence that the disclaimed assets fell into residue for their benefit.

The question in the case is whether section 45 (2) of the Finance Act, 1940, has the effect of extending the liability to duty on gifts inter vivos imposed by section 2 (1) (*c*) of the Finance Act, 1894 (as amended) to the comparable benefit conferred on a residuary legatee or devisee by means of a disclaimer, whereby the subject-matter of the gift disclaimed is caused to sink into the residue to which he is entitled.

Section 45 of the Finance Act, 1940 (the sidenote to which is "Gifts by way of creation of burden or release of right") is in these terms. [His Lordship read the section and continued:] It will be seen that to found liability under subsection (2) of the section there must be (i) a debt or other right, and (ii) an extinguishment of that debt or other right, (a) at the expense of the deceased, and (b) for the benefit of some other person. Where these elements are present the enactment imputes to the deceased

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for estate duty purposes a disposition in favour of the person for whose benefit the debt or right was extinguished of property consisting of the benefit conferred by such extinguishment. This produces the result that the benefit conferred by a transaction falling within the ambit of subsection (2) of section 45 of the Act of 1940 is to be treated as " property . . . taken under a disposition " made by ' the deceased ' purporting to operate as an immediate " gift inter vivos " within the meaning of section 2 (1) (*c*) of the 1894 Act, and the provisions incorporated therein of section 38 (2) (*a*) of the Customs and Inland Revenue Act, 1881, and is therefore to be deemed under section 2 (1) (*c*) of the 1894 Act to pass, and, accordingly, attract estate duty, on the death of the deceased within the statutory period (now five years) of the making of such disposition.

The application of section 45 (2) of the 1940 Act to the transaction now in question thus demands an affirmative answer to each of the following questions:

(1) Did Mrs. Stratton have a " right " in respect of the policies and freehold property bequeathed and devised to her during the period between the death of the testator and the execution of the deed of disclaimer?

(2) If so, did the disclaimer bring about an " extinguishment " of that right?

(3) If so, was such extinguishment effected " at the expense " of " Mrs. Stratton?

(4) If so, was the right extinguished " for " the " benefit " of the three sons?

As to the first question, we were referred to certain authorities bearing upon the right to disclaim, the effect of disclaimer and the position of a legatee or devisee pending disclaimer.

In *Townson* v. *Tickell* [1] Abbott C.J. said: " The law certainly " is not so absurd as to force a man to take an estate against his " will. Prima facie, every estate, whether given by will or other- " wise, is supposed to be beneficial to the party to whom it is so " given. Of that, however, he is the best judge, and if it turn " out that the party to whom the gift is made does not consider it " beneficial, the law will certainly, by some mode or other, allow " him to renounce or refuse the gift."

Then, after referring to *Thompson* v. *Leach*,[2] Abbott C.J. went on: " That learned judge expressly states,"—that was Ventris J. —" that a man ' cannot have an estate put into him in spite of

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[1] (1819) 3 B. & Ald. 31, 36, 37.

[2] (1692) 2 Vent. 198.

" 'his teeth.' I concur in that opinion, and think that the " renunciation here having been by deed under the hand and seal " of the party, must have the effect of making the devise with " respect to him null and void, and, consequently, that there " must be judgment for the plaintiff."

Then Bayley J. said[3]: " The good sense of the thing is quite " the other way; the law indeed presumes, that the estate devised " will be beneficial to the devisee, and that he will accept of it, " until there is proof to the contrary. Here is a renunciation by " a most solemn act, viz., by deed; and by that he has said, that " he did not choose to accept that which is devised to him. It " seems to me, that the effect of that is, that the estate never was " in him at all. For I consider the devise to be nothing more than " an offer which the devisee may accept or refuse, and if he " refuses, he is in the same situation as if the offer never had been " made; and that being so, I am of opinion, that the disclaimer in " this case, was sufficient, and that there ought to be judgment for " the plaintiff."

Then Holroyd J. said[4]: " I think that an estate cannot be " forced on a man. A devise, however, being prima facie for the " devisee's benefit, he is supposed to assent to it, until he does " some act to show his dissent. The law presumes that he will " assent until the contrary be proved; when the contrary, how" ever, is proved, it shows that he never did assent to the devise, " and, consequently, that the estate never was in him. I cannot " think that it is necessary for a party to go through the form of " disclaiming in a court of record, nor that he should be at the " trouble or expense of executing a deed to show, that he did not " assent to the devise."

In *In re Wimperis*[5] Warrington J. held that a married woman could disclaim an annuity given to her by will subject to a restraint on anticipation. He said[6]: " So far I have " dealt with the case of a married woman not restrained from " anticipation. But suppose the married woman is restrained " from anticipation, does a restraint on anticipation make any " difference? It is still property which she has power to acquire " and hold as a feme sole. If she acquires it the restraint on " anticipation applies, but I fail to see how the fact that if she " acquired the property it would be subject to the restraint on " anticipation would prevent her from saying 'I will not acquire " 'it.' I think she is entitled to say 'No, I will have nothing

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[3] 3 B. & Ald. 31, 37, 38.

[4] Ibid. 38.

[5] [1914] 1 Ch. 502.

[6] Ibid. 508.

" ' to do with it. I decline to take it with the burden imposed " ' on it.' It is said, however, that that is contrary to section 19 " of the Married Women's Property Act, 1882. Section 19, so " far as is material, provides that nothing in the Act contained " shall interfere with or render inoperative any restriction against " anticipation attached to the enjoyment of any property or " income by a married woman under any settlement, agreement " for a settlement, will, or other instrument. In the case of a " disclaimer the restraint on anticipation never becomes attached " to the enjoyment of the property at all because the married " woman has not become entitled to the property. It seems to " me that the provision in the Act cannot apply to the case of a " disclaimer or prevent a married woman from disclaiming the " property to which if not disclaimed the restraint on anticipation " would attach."

Then the judge said,[7] after referring to *Lady Bateman* v. *Faber*[8]: " The Master of the Rolls, however, in stating the result " is careful to say ' that a married woman, having an estate for " ' her separate use without power of anticipation, can play fast " ' and loose to a greater extent than if she were a feme sole.' " But in the present case if the married woman has in fact " declined the gift she never had an estate for her separate use " and has never been subject to the restraint on anticipation, and " the remarks of Lindley M.R. are not applicable. In my judg- " ment, therefore, a married woman may since the passing of the " Married Women's Property Act, 1882, disclaim a gift to her of " personal estate although it is given to her with a restraint on " anticipation. I think, therefore, that a disclaimer under these " circumstances would be valid."

These cases contain observations which might be taken to indicate that a disclaimer in making the gift disclaimed void ab initio has the effect in law of placing the disclaiming party retrospectively in the same position for all purposes, throughout the period from the date of the gift to the date of disclaimer, as if the gift had never been made, so that the disclaiming party is to be looked upon as having never had any right in respect of the gift disclaimed. That extreme position goes beyond anything that was necessary to the decision of the cases cited, and cannot now be maintained in view of the decision of this court in *In re Parsons.*[9] In that case a testatrix left her husband a sum of stock absolutely and gave him a life interest in the residue of her estate. The husband by deed disclaimed the legacy, which accordingly fell into residue, and as part of the residue became subject to the husband's life interest. On the death of the husband the question arose whether between the date of the testatrix's death and the date of the disclaimer the husband had been competent to dispose of the stock so as to exclude it from the exemption from estate duty on his death accorded to the testatrix's residuary estate by the saving provision in favour of spouses contained in proviso (*a*) to section 14 of the Finance Act, 1914, which, in other cases, abolished the relief in respect of settled property allowed by section 5 (2) of the Finance Act, 1894.

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[7] [1914] 1 Ch. 502, 509.

[8] [1898] 1 Ch. 144, 149; 14 T.L.R. 81.

[9] [1943] Ch. 12; 59 T.L.R. 19.

The court held that this question should be answered in the affirmative. Lord Greene M.R. said[10]: "It is said that the "competence of the husband in relation to the £10,000 consols "ceased on the disclaimer. No criticism can be made of that. "It is also conceded that between the dates of the death of the "testatrix and disclaimer some interval of time passed during "which the husband had not yet decided to disclaim, and that "during that period he was competent to acquire the right to "dispose of the consols, but it is said that he never in fact "acquired that right because he disclaimed the legacy. The "argument then proceeds on the basis that on the true construction of the subsection a legatee who is competent to acquire the "right to his legacy, that is, who is competent to take it if he "decides not to disclaim, is not competent to dispose of the "subject-matter of the legacy within the meaning of the subsection."

Then a little later on the Master of the Rolls said: "From "the moment of the testatrix's death the husband was able to "make the legacy his own. In fact, if he had died without doing "anything, his executors would have been entitled to the legacy "merely because he had not disclaimed it. During the period "between the death of the testatrix and the disclaimer he was "unquestionably 'competent to dispose' within the meaning of "those words in the subsection, which, I think, are wide and, "in a sense, popular in meaning."

Again, a little later on, he said: "So far as is applicable to "the present case the definition is: 'A person shall be deemed "'competent to dispose of property if he has any power or "'authority enabling him to appoint or dispose of property as he "'thinks fit.' That language seems to me clearly to cover the

[10] [1943] Ch. 12, 15.

"case of a legatee to whom a legacy has been given and who is in "a position either to take it or to disclaim it as he thinks fit. "In the present case, the husband was in that position during "the interval between the testatrix's death and the disclaimer, "and I need scarcely add that the fact that for some purposes a "disclaimer makes the gift void ab initio does not mean that "during the period to which I have referred the competence must "be treated in law as not having existed. The doctrine of the "gift being void ab initio has nothing to do with considerations of "that kind."

Then the Master of the Rolls said[11]: "He"—that is the husband—"was, as Mr. Stamp put it, in a position not unlike "that of a person with a binding option. He could take the "legacy out of the mass if he thought fit, and of course the "court would assume that he had intended to take it apart from "a disclaimer or acts from which disclaimer could be inferred."

Then Lord Clauson, after expressing his complete agreement with the Master of the Rolls, said this towards the end of his short judgment[12]: "The practical position is just the same as if "he had accepted the legacy and had then assigned it to the "trustees of the will on the trusts of the settlement. If that had "happened the revenue authorities would obviously have been "entitled to the estate duty which they are now claiming. I "cannot help saying that I feel some satisfaction that we have "not been forced to give the estate a benefit in regard to estate "duty purely by reason of the technical considerations attaching "to a disclaimer."

I think it is clear from that case that a disclaiming legatee or devisee has between the testator's death and the moment of disclaimer a right in respect of the legacy or devise, in that he is, during that period, entitled to call upon the executors to pay or transfer to him the subject-matter of the bequest or devise in due course of administration. It is none the less a right because it is defeasible by the beneficiary's own act of disclaimer. That merely means that he is free to choose whether to avail himself of it or not until such time as he has either unequivocally disclaimed or unequivocally accepted the gift. If he disclaims, then he avoids the gift, and with it the concomitant right, but that does not alter the fact that down to the moment of disclaimer he did have the right and would still have had it if he had not disclaimed. Mr. Russell, for the three sons, did not in the end dispute that between the death of the testator and the date of her disclaimer Mrs. Stratton did have a right of a sort in respect of the policies and freehold property bequeathed and devised to her. But he said that it was a right of a peculiar and circumscribed character, a mere right to accept or refuse a proffered gift, which could not fairly be brought within the scope of section 45 (2) on the strength of its sweeping and unparticularized reference to "a debt or other right." I cannot accept this argument. Mr. Russell did not seek to limit the effect of the words "debt or other right" by an application of the ejusdem generis rule, and, in my view, it would not be possible to do so. In the absence of any such restriction on its meaning the word "right" is a word of the widest import, and if, in accordance with my view, Mrs. Stratton can properly be held to have had a right in respect of the specific bequest and devise pending disclaimer, I see no ground for holding that it was not a right within the meaning of section 45 (2). I am accordingly of opinion, as was the judge, that the first of the four questions posed above must be answered in the affirmative.

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[11] [1943] Ch. 12, 17.

[12] Ibid.

As to the second question, I entirely agree with the judge that the disclaimer must be held to have operated as an extinguishment of Mrs. Stratton's right in respect of the specific bequest and devise. It seems to me that a disclaimer such as this is a typical example of the extinguishment of a right.

As to the third question, the extinguishment of the right was at the expense of Mrs. Stratton in that she thereby lost the benefit of the specific bequest and devise. That seems to me to suffice to satisfy this requirement of section 45 (2). Here, again, I find myself in agreement with the judge who said, as regards this aspect of the case [13]: "I come now to the third requirement, "the words 'at the expense of the deceased.' It was contended "on behalf of the plaintiffs that those words inferred that there "must be something like the person who extinguished the debt "putting his hand into his pocket. I cannot see why there should "be any such limitation. It seems to me that the words 'at the "'expense of the deceased' are not used in any technical manner "but in an ordinary and natural manner, which plainly seems "to be covered by the definitions contained in the Oxford English "Dictionary of 'expense' in which the words 'cost or sacrifice "'involved in any course of action' are used. Consequently, it "seems to me that this requirement is satisfied."

[13] [1957] Ch. 132, 142, 143; [1956] 3 All E.R. 862.

I think this view is borne out by a consideration of the case specifically mentioned in section 45 (2) of the extinguishment of a debt. In the case of a debt owing to the deceased, it is plain that its extinguishment would not involve the deceased in any "expense" in the sense of paying out money. Nevertheless, such extinguishment would, I think, rightly be described as having been effected at his expense in that by extinguishing the debt he deprived himself of his right to recover it. If this was not so, it would be difficult to see how the requirement of section 45 (2) that the extinguishment should be at the expense of the deceased could ever be satisfied in the case of the extinguishment of a debt owing to the deceased, although that is clearly one of the possible transactions at which section 45 (2) is aimed. Accordingly, I would give an affirmative answer to the third question also.

As to the fourth and final question, it is to my mind self-evident that the extinguishment of Mrs. Stratton's right in respect of the specific bequest and devise was for the benefit of the three sons. The effect of the extinguishment was to cause the policies and freehold property to sink into the residue of the testator's estate, and the three sons being entitled to such residue in equal shares benefited accordingly. The judge apparently took the view that in order to satisfy this requirement of section 45 (2) it was necessary that a positive intention on the part of Mrs. Stratton to benefit the three sons must be shown. There was no direct evidence to this effect, but the judge found that the facts raised a presumption that Mrs. Stratton did intend to benefit the three sons on the principle that one should "attribute the intention to produce the results which naturally "follow from the transaction in question." He held that there was no evidence to rebut the presumption, and that as it was not rebutted he "must presume that the disclaimer was executed for "the purpose of benefiting the three sons." I cannot accept the view that, in referring to "the person for whose benefit the debt "or right was extinguished," section 45 (2) means any more than the person for whose benefit the extinguishment of the debt or right operated. I find it impossible to hold that the section requires it to be shown not only that some person benefited in fact but also that, in bringing about or suffering the extinguishment, the deceased was actuated by the intention, purpose or desire of benefiting that person. The motive or purpose of the deceased appears to me to be immaterial, provided the transaction was gratuitous and did, in fact, benefit the other person concerned.

In the vast majority of cases there would no doubt be an intention on the part of the deceased to benefit the person in fact benefited by the transaction, and it is clear that to bring a case within section 45 (2) it must be shown that some person did in fact benefit.

It is also true to say that the effect of the referential operation of section 45 (2) is (as indicated by the sidenote) to bring the transactions to which it relates into the category of gifts inter vivos taxed under section 2 (1) (*c*) of the Act of 1894; and, as the judge observed, gifts involve the relationship of donor and donee.

But, to take the ordinary case of a gift inter vivos, it seems to me to be plain that where a donor gratuitously transfers property to a donee so as to constitute the donee beneficial owner of the property transferred, there is a gift of that property to the donee whatever the motive, purpose or intention of the donor may have been.

A man may (for instance) give his property to a charity not because he wants to benefit the charity but because he wants to prevent some other person from getting it. There can be no doubt, however, that the disposition in favour of the charity would be a gift.

The same would, to my mind, be the case where the gift proceeded from motives other than that of benefiting the donee such as those instanced by the judge[14]: "it might be because "the legatee did not wish to receive any benefit from a testator "because he or she regarded the property as tainted in some way "or other, or had a personal dislike for the testator or something "of that kind."

Returning to the language of section 45 (2), I cannot find in it any indication that the subsection is only to apply where the right is extinguished for the purpose or with the intention of benefiting some other person. It assumes that some person will in fact benefit and creates a notional disposition in favour of that person as the person for whose benefit the right is extinguished. If the subsection had been meant to apply only where a positive intention to benefit some person, as well as a benefit to him in fact, can be found, I think it would inevitably have contained some reference to intention. The word "for" in the phrase "for whose benefit" seems to me to connote result rather than intention, and I cannot regard it as sufficient to introduce into the subsection the requirement of intention to benefit as well as benefit in fact.

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[14] [1957] Ch. 132, 144.

Similar phrases can be found in other sections of the enactments relating to estate duty, in contexts where they appear to mean nothing more than the benefit in fact of the person concerned. Section 11 of the Finance Act, 1900, speaks of a life interest having been "surrendered, assured, divested, or otherwise "disposed of . . . to or for the benefit of any person entitled to "an estate or interest in remainder or reversion." In that passage "to or for the benefit of" seems to me to mean in effect "directly to, or indirectly so as to benefit." In section 39 of the Finance Act, 1930, which in effect extended the provisions of section 11 of the Finance Act, 1900, to annuities, the words "to or for the benefit of" appear to bear a similar meaning.

Accordingly, while differing from the judge so far as he considered that section 45 (2) requires that an intention to benefit the person in fact benefited by the extinguishment of the right should be shown, I agree with his conclusion to the effect that the fourth question should like the others be affirmatively answered.

It follows, in my judgment, that all the requirements of section 45 (2) are satisfied in this case and that the consequent claim to estate duty on the death of Mrs. Stratton was rightly upheld by the judge.

In the course of his argument to the contrary, Mr. Russell relied on section 43 of the Act of 1940, which relates to the "disposition or determination of life interests, etc." He pointed out that section 43 contained no reference to the disclaimer of a life interest, and used that omission as an indication that section 45 (2) did not extend to disclaimers. I do not follow this. I fail to see why all cases of the extinguishment of rights should not have been advisedly dealt with together in one section.

Mr. Russell also relied by way of reductio ad absurdum on various examples of the possible results of the inclusion of disclaimers in section 45 (2), especially if the view I have expressed above on the question of intention were to prevail. He instanced the imaginary case of a lady receiving through the post a parcel of jewels from an unwanted admirer, suggesting that if she rejected them and returned them forthwith to the sender, duty would be chargeable upon them in the event of her death within five years. I think the answer may be that in such a case there would be no extinguishment of a right but merely a failure of an abortive gift.

Mr. Russell also suggested the possible case of a gift to a person upon some condition (such as change of religion or something of that sort) which the donee was unable or unwilling to fulfil, and which accordingly led him to disclaim the gift. I am not satisfied that section 45 (2) would apply to such a case, or that if it did, would result in any duty being exigible, and as at present advised I think that at all events if the condition was a condition precedent it probably would not be within section 45 (2), though I must not be taken as prejudging any question of this kind which may hereafter actually arise for decision.

Mr. Russell gave other examples of disclaimers on grounds of conscience, dislike of the donor, dislike of the source of the donor's money or the character of the asset given (e.g., a gift of brewery shares to a teetotaller) and the like, which seemed to me (while they did credit to Mr. Russell's ingenuity) to be for the most part somewhat improbable and far-fetched.

Mr. Russell also emphasized the unfairness (as he would have it) of aggregation in the hypothetical cases to which he referred.

I find in Mr. Russell's submissions no sufficient ground for excluding the transaction with which we are now concerned from the operation of section 45 (2) if, as I think, it falls fairly within the language of the enactment. I confess that I am disposed to deprecate recourse in revenue legislation to sweeping generalities of this kind, but the mere fact that an enactment is couched in general and comprehensive terms affords no ground for excluding from its operation transactions falling fairly within its provisions, general though they may be.

Finally, whatever may be thought of Mr. Russell's hypothetical cases, it seems to me that arguments ad absurdum on the side of the taxpayer are to some extent offset by the consideration that it might be said to be, to say the least, anomalous that a benefit conferred by transfer should be dutiable in the event of the donor's death within five years, while a precisely similar benefit conferred by disclaimer should not attract duty on the death of the disclaiming party however soon after the date of the disclaimer that event might occur. I quote again the concluding sentence of the judgment of Lord Clauson in *In re Parsons*[15]: "I cannot help saying that I feel some satisfaction "that we have not been forced to give the estate a benefit in

[15] [1943] Ch. 12, 17.

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STRATTON'S DISCLAIMER, *In re.*

"regard to estate duty purely by reason of the technical con-"siderations attaching to a disclaimer."

For the reasons I have endeavoured to state, I think the judge came to a right conclusion in this case, and I would accordingly dismiss the appeal.

SELLERS L.J. I agree with the judgment which my Lord has delivered.

I have felt some hesitation in accepting the argument for the Crown which challenged Danckwerts J.'s opinion that the extinguishment, to fulfil the requirement of section 45, must be for the benefit of some person, in the sense of a "conscious "intention on the part of the person who executed the disclaimer "to benefit somebody else."

The judge pointed out that the section is concerned with gifts and, of more importance, it contains the words "for whose "benefit the right was extinguished," which seems to give some indication of motive or intention. The words are not very clear and on consideration I agree with the opinions expressed by Jenkins L.J. and Roxburgh J.

The other view would, I think, have served to overcome many of the criticisms to which the section perhaps lays itself open, an opportunity of which Mr. Russell was not slow vividly to avail himself.

However, if I had adhered to the judge's interpretation, my decision would not have assisted the appellants because, in my view, the judge was justified in holding in this case that the disclaimer was with the intention or for the purpose of benefiting the children.

ROXBURGH J. I agree, and should not have added anything if we had not been differing from my brother Danckwerts on a point important in itself though not decisive of the present case. On this point I adopt what Jenkins L.J. has already said, and would add that, in my opinion, the structure of section 45 (2) of the Finance Act, 1940, points to the same conclusion. A certain state of facts is to be deemed to be a different state of facts, and the line between fact and hypothesis seems to me to be drawn by the word "deemed." If this be so, only three actual facts are expressed to be necessary in order to involve the hypothetical situation, (1) the existence of a right, (2) its extinguishment, (3) its extinguishment at the expense of the deceased. When those three facts concur, the hypothesis goes into action, and the hypothesis is that these facts are equivalent to a disposition made by the deceased in favour of the person for whose benefit the right was extinguished. These words, in my opinion, all form part of the hypothesis and the concluding words are necessary to define the hypothetical disponee. If they were intended to add a fourth limb to the actual facts, they ought to have preceded the word "deemed." Even if they had done so, there might well still have been a doubt whether positive intention to benefit would have to be proved. But in their actual position in the sub-clause, that argument is much more difficult and ought not, in my view, to prevail.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Mackrell, Maton & Co.; Solicitor of Inland Revenue.*

J. A. G.

In re AUSTIN MOTOR-CAR CO. LTD.'S AGREEMENTS.

[1957 A. No. 391.]

1957
June 1, 20, 21; *July* 18

Upjohn J.

Restrictive Practice—Registration—Agreements registrable—Motor-car manufacturers — Restrictive trading agreements — Agreements between company and their distributors and dealers—Multipartite agreements — Liability of existing agreements to registration — New bipartite agreements substituted to avoid necessity of registration — Whether new agreements registrable — Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 6 (1) (2) (3), 7 (2), 8 (3), 9.

A company which carried on the business of manufacturing motor-cars had a system of multipartite agreements between itself and its distributors and dealers. These agreements were transformed into bipartite agreements, on the coming into force of the Restrictive Trade Practices Act, 1956, with a view to their being exempted from the provisions requiring the registration of every agreement to which Part I of that Act applied.

An application was made to the High Court on behalf of the company by summons under section 13 (2) of the Act, in which a declaration was sought that none of these bipartite agreements was a registrable agreement or arrangement within the meaning of the Act:—

Held, that the court could only take the new agreements as they stood; that the new agreements contained the whole of the arrangements between the parties, no further or collateral arrangement being alleged; and that, on their true construction, they were excepted from the operation of Part I of the Act and were not subject to registration.

Dunlop Pneumatic Tyre Co. Ltd. v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 855; 31 T.L.R. 399 and *Inland Revenue Commissioners* v. *Westminster (Duke of)* [1936] A.C. 1; 51 T.L.R. 467 considered.

ADJOURNED SUMMONS.

An application was made to the High Court by Austin Motor-Car Co. Ltd. (hereinafter called " Austins ") to determine whether certain agreements were registrable under the Restrictive Trade Practices Act, 1956.[1]

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[1] Restrictive Trade Practices Act, 1956, s. 6: " (1) Subject to the provisions of the two next following sections, this Part of this Act applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods; (b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods; (c) the quantities or descriptions of goods to be produced, supplied or acquired; (d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or (e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied.

" (2) For the purposes of the foregoing subsection it is immaterial whether any restrictions accepted by parties to an agreement relate to the same or different matters specified in that subsection, or have the same or different effect in relation to any matter so specified, and whether the parties accepting any restrictions carry on the same class or different classes of business.

" (3) In this Part of this Act ' agreement ' includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Part of this Act to restrictions accepted under an agreement shall be construed accordingly; and ' restriction ' includes any negative obligation, whether express or implied, and whether absolute or not."

S. 7 (2): " In determining whether an agreement for the supply of goods or for the application of any process of manufacture to goods is an agreement to which this Part of this Act applies, no account shall be taken of any term which relates exclusively to the goods supplied, or to which the process is applied, in pursuance of the agreement."

S. 8 (3): " This Part of this Act does not apply to any agreement for the supply of goods between two persons, neither of whom is a trade association within the meaning of

The application was made by summons under section 13 (2) of that Act, as a test case, and a declaration was asked for " that " there is not a registrable agreement or arrangement within " the meaning of the Restrictive Trade Practices Act, 1956, by " reason of each and every agreement entered into by the " applicants with their distributors, dealers and other traders, " by which agreements or some of them the applicants have " granted exclusive territories for resale to the trade and have " agreed to supply their goods, or procure them to be supplied, " for instance, through their distributors, at specified discounts, " provided that only the applicants and one other party are " parties to each of such agreements and that such agreements " relate exclusively to the goods supplied by the applicants or " other goods of the same description, and for such further or " other order as to this honourable court may seem fit . . ."

The general pattern of Austins' sales organization until 1957, as stated in his Lordship's judgment, was as follows. Austins appointed distributors or main dealers for certain large areas of the country, who entered into annual written agreements with Austins, whose operations began on August 1 in one year and ended on July 31 in the next year. An example of their agreements was one with Messrs. Car Mart (Sales) Ltd., trading as Adams Garage, Colchester, dated August 1, 1956. The area in respect of which that company was appointed distributors was the county of Essex, except a portion in the south-west of that county.

Within the distributor's area two or three subsidiary agents might be appointed. They were known as dealers. Dealers also entered into annual written agreements, also dated August 1 in each year, with Austins. Normally the distributor for that area was also a party. Again, by way of example, a dealer in the Car Mart area had been selected, namely, the Southend Motor and Aero Co. Ltd. The sub-area in respect of which that dealer was appointed was that part of the Car Mart area in the county of Essex south of the River Crouch.

By those annual agreements the distributor was bound to purchase a certain number of Austin cars, as specified in the

" section 6 of this Act, being an " agreement to which no other person " is party and under which no " such restrictions as are described " in subsection (1) of section 6 of " this Act are accepted other than " restrictions accepted (a) by the " party supplying the goods, in " respect of the supply of goods of " the same description to other persons; or (b) by the party acquiring " the goods, in respect of the sale, " or acquisition for sale, of other " goods of the same description."

agreement, from Austins in each year. A certain proportion of those cars was available for sale by the distributor to the public, but the remainder must be available for resale in the trade. The cars were sold to the distributor at the current retail prices, less a discount of 17½ per cent. The cars permitted to be sold to the public might be sold to any individual purchaser not buying for resale in the way of his trade, whether or not he lived in the distributor's area, but only at the full retail price.

In addition, the distributor was bound to maintain a certain number of new and unused current vehicles for show purposes and a certain rather lesser number of demonstration models.

The dealer was likewise bound to purchase a certain number of cars each year; he was at liberty to sell them at the full retail price to any individual purchaser, wherever he lived, but, as in the case of the distributor, a certain number of cars must be available for resale in the trade. The dealer purchased his cars for resale from the distributor for his area and they were invoiced to him at the full retail price, less a discount of 17½ per cent., and in that event Austins paid the distributor an additional discount of four per cent.

The dealer was also bound to maintain on his premises a certain number of show and demonstration vehicles, though fewer than the distributor.

Next in order of importance came the retail dealer. He was also bound by an annual written agreement, beginning on August 1 each year. Normally the distributor and dealer were also parties to the agreement. The retail dealer was not appointed in respect of any area, but he undertook to purchase so many Austin motor-cars every year for sale to purchasers buying retail only. He did not resell in the trade. He normally purchased from a dealer at a discount of 17½ per cent. off the current list price and the dealer in such circumstances received a discount of two per cent. The retail dealer was bound to maintain one demonstration car.

There were other classes of dealers, for example, registered dealers, who were probably distributors or main dealers in some other make of car, but who desired to run a small line in Austin motor-cars—they received a discount of 10 per cent.—and stocking traders who got a discount of 14 per cent.

The number of appointed distributors or main dealers for the year 1956–1957 was about 141. There were 157 dealers, 1,050 retail dealers, 1,019 stocking traders and 1,589 registered traders.

In addition, a number of distributors were appointed for commercial vehicles only.

On August 2, 1956, the Act came into force, and on November 16, 1956, Austins took steps by which they purported to turn every multilateral agreement into a bilateral agreement, it being intended that the new agreements, being bipartite agreements, should satisfy the conditions contained in section 8 (3) of the Act, so that Part I should not apply to them, and, therefore, on February 26, 1957, by way of providing this test case, Austins entered into new agreements with Car Mart and Southend Motors which purported to regulate the relations of the parties as from August 1, 1956. Both of these agreements were bipartite.

[The material provisions of the former agreements and of the new agreements are stated in the judgment.]

G. T. Aldous Q.C. and *D. C. Johnson-Davies* for the applicants. It is said by the registrar that the general pattern of distribution by the applicants throughout the country constitutes a registrable agreement. [Reference was made to sections 6 and 10 of the Act; and to *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.*[2] and *Balfour* v. *Balfour.*[3]] That would seem to show that the " agreement or arrangement " as contemplated in section 6 (3) of the Act would mean something in which there were some mutual promises, but here there is no such " agreement or arrangement " between the contractors inter se. The restrictions are to be found only in two party agreements and are imposed by the manufacturers on their distributors and dealers.

A restriction in a two party agreement is not registrable if it falls within either section 7 (2) or section 8 (3).

Austins had a number of tripartite agreements which would have been registrable, because they contained restrictions and were not two party agreements. The new forms of agreements before the court are two party agreements and were entered into for the express purpose of this summons to obtain the decision of the court on a matter which affects a number of motor-car manufacturers. In so far as there are any restrictions in these new agreements, they are either restrictions under section 7 (2) or section 8 (3). Each of the agreements, looked at by itself, is a two party agreement and not a three party agreement.

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[2] [1925] A.C. 445.

[3] [1919] 2 K.B. 571; 35 T.L.R. 609.

As to there being an "arrangement" within section 6 (3), in clause 15 of Austins' agreement with their distributors the distributor is under an obligation to supply cars to the dealer at a specified discount. Under Austins' agreement with their dealers the dealer agrees to purchase from Austins, or from such person as they shall direct, a certain number of cars. Normally Austins would direct that the source from which the dealer would purchase its cars would be the distributor. There is, under the new agreements, no exchange of promises, no mutuality, between distributor and dealer. There is nothing in the nature of an agreement in its broadest sense between any distributor or any dealer. Each would only be carrying out its agreement with Austins. The agreements are therefore two party agreements and, as the restrictions fall within sections 7 (2) and 8 (3), none of the new agreements are registrable.

Sir Harry Hylton-Foster Q.C., S.-G., and *J. R. Cumming-Bruce* for the respondent, the Registrar of Restrictive Trading Agreements. Registration under the Act is an end in itself and, if caught by the Act, an agreement must be registered. The testing element is consent; where mutual consent to restrictions is found, then there is an agreement registrable under the Act. The difficulty of the Registrar was to ascertain whether it was right to say that in the circumstances of this case, on its particular facts and in the light of its particular history, there is an "arrangement"; the history here is important.

It is not contended that the mere fact that a manufacturer has entered into a series of "vertical" agreements necessarily constitutes an arrangement. But it is capable of being evidence of an arrangement, and here other factors were present from which the existence of an arrangement should be inferred. Before the alteration of the agreements the agreements were multipartite. Austins apparently had no wish to make any change in the way in which business was done, and the alteration to the bipartite agreement was a device to continue doing that which they were doing before. When the new agreements are examined, their commercial efficacy is dependent on the existence of other agreements, and the plan involves a knowledge, on the part of each of the participants, of the terms of the agreement by which any one remoter than himself in the chain of supply is bound. The court is asked to look at the reality rather than the form. It is, on the documents and history, a fair inference that the reality of the obligations is not changed, and, if the character of the obligations is not changed, cadit quaestio.

The first stage was the existence of multipartite agreements; this was modified by unsuccessful attempts to present the middlemen as agents; finally, the new agreements are developed, each of which is mutually interdependent with all the others.

[Counsel here commented on the old and new agreements and submitted that no significant variation of obligations had occurred, though the machinery was different in that many bipartite agreements, running in parallel, imposed the same obligations as were previously imposed by the multipartite agreements.]

Under the principle in *Dunlop Pneumatic Rubber Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[4] multipartite agreements were required from all persons in the chain of supply in the trade in order to carry on their method of trading. Then came the present statute which required registration of such agreements. By the use of bipartite agreements, however, the company seeks to maintain its mutual arrangements. As a result of that change of pattern, an agreement, originally mutually enforceable, has lost its mutual enforceability in a court of law, but it remains a mutual acceptance of obligations which is an arrangement within section 6 (3).

In effect, dealers and distributors use the manufacturers as their common agent to maintain the mutual arrangements between themselves.

The conception of mutual obligations secured by bipartite agreements with a central figure is not unknown to the law, and they are sometimes enforceable; for instance, covenants running with the land under a building scheme.

It is the reciprocity of interests which matters—all persons in the network having a common interest: see the judgment of Wills J. in *Nottingham Patent Brick and Tile Co.* v. *Butler.*[5]

The original agreements involved a mutual acceptance of obligations. There was a demonstrated intention of a mutual acceptance of restrictions. The new agreements should be read together against that background. [*Spicer* v. *Martin*[6] was referred to.]

Aldous Q.C. replied.

Cur. adv. vult.

July 18. UPJOHN J. read the following judgment: The applicants, the Austin Motor-Car Co. Ltd. (which I will call

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[4] [1915] A.C. 847, 855; 31 T.L.R. 399.

[5] (1885) 15 Q.B.D. 261, 268; (1886) 16 Q.B.D. 778; 2 T.L.R. 391.

[6] (1888) 14 App.Cas. 12.

"Austins"), are well-known manufacturers of motor-cars and normally sell their cars to the public through dealers appointed throughout England and Wales. The term "agents," though used frequently by the public, is in fact a misnomer because, except for certain limited purposes, these appointed persons are not agents in law, but sales to the public are carried out by a series of sales and resales between Austins and their network of dealers.

[His Lordship stated the facts relating to Austins' sales organization as above set out and continued:] The question I have to determine is whether the agreements to give effect to it are subject to registration under the Restrictive Trade Practices Act, 1956. Before examining the agreements in greater detail, however, it will be convenient to look at the relevant provisions of that Act.[1] [After reading section 6 (1), (2) and (3), his Lordship continued:] Pausing there, I have already said sufficient to indicate that, had the Act stopped there, all the sub-paragraphs of section 6 (1) would apply to these agreements, except possibly sub-paragraph (d), but the subsection is expressly stated to be subject to the provisions of the two next following sections. [His Lordship read section 7 (2) and section 8 (3) and continued:]

Section 9 provides for registration of every agreement to which Part I of the Act applies, and by the operation of Statutory Instrument 1956, No. 1869, agreements of the class which I have to consider became subject to registration on or before February 29, 1957. On the day before that date Austins issued an originating summons under section 13 (2) of the Act, asking for a declaration that the relevant agreements were not subject to registration under the Act. Accordingly, by virtue of section 13 (3), the period of registration, if it be found that the agreements are subject to registration, is extended by a period equal to the period during which this proceeding and every appeal therefrom is pending and such further period as the court may direct.

On August 1, 1956, in the usual way, Austins entered into annual agreements with their distributors, dealers, retail dealers and so on. The agreements are in printed common form for each type of agreement, except of course as to the number of cars to be purchased and so on, and are very long and detailed. I do not propose to read any of the clauses at length. Beyond dealing with the primary methods of sale and resale which I have briefly mentioned, these agreements deal with after-sales service, supply of spare parts and other matters which I shall mention later.

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[1] See footnote, ante 62.

Following the practice in earlier years, some of the agreements were bipartite, for example, between Austins and a distributor, some tripartite, for example, between Austins, a distributor and a dealer, and some even quadripartite, for example, between Austins, a distributor, a dealer and a retail dealer. In the case of the last three classes of agreement the protection afforded by section 8 (3) is, it is conceded by Austins, not available, though section 7 (2) remains available.

Again, however, it is not disputed that section 7 (2) does not prevent Part I of the Act from applying to the multipartite agreements with Austins, for while many conditions appear in these agreements which prima facie are within section 6 (1), but which are to be left out of account as being terms which relate exclusively to the goods supplied (for example, price controls), there are many other terms which do not so relate.

For example, in the first tripartite form of agreement, dated August 1, 1956, clause 6 (a) precludes the dealer from contracting for the sale of cars, light vans, and other specified types of vehicles made or dealt in by any other motor manufacturer or concessionaire without Austins' consent in writing. Clause 7 (a) precludes the dealer from selling or permitting to be sold any vehicle or second-hand, shop-soiled or used vehicle of Austins' manufacture for export outside the United Kingdom without Austins' written permission. Clause 18 (a) provides that where vehicles of any make are taken in part exchange the dealer is to have regard to the prices in the current issue of the National Used Vehicle Price Book. Again, clause 20 compels the dealer to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own nomination, provided the same be approved by Austins.

The Act passed into law on August 2, 1956, and, no doubt seeing these difficulties in their way, every agreement of August 1, 1956, contained this final clause: "50. In that the Restrictive "Trade Practices Bill is likely to become law during the currency "of this agreement and in that it is impossible at the present time "to forecast those alterations and modifications of the company's "orderly marketing arrangements which the said Bill in its final "form may require or which the company may consider advisable "or desirable in the light thereof, it appears reasonably certain "that a number of alterations and amendments to this agreement "will be necessary during its currency. It is therefore agreed "that, notwithstanding anything contained in this agreement, "the company shall have the right at any time on giving fourteen "days' notice to the signatory to alter or amend this agreement "or to substitute a new agreement or agreements in so far as may "be necessary or advisable to enable the company to uphold its "orderly marketing arrangements in the light of the Restrictive "Trade Practices Bill when it becomes law. Provided always "that this clause shall not in itself be deemed to entitle the "company to vary the margins, discounts, or commissions agreed "to be paid or allowed to the signatory hereunder or to require "him to undertake the stocking of a greater number of vehicles "or parts than is otherwise provided herein."

On November 16, 1956, Austins sent out to all their distributors, main dealers, retail dealers and stocking traders a remarkable letter which purported to turn every multilateral agreement into a bilateral agreement. How it was to work Mr. Aldous was quite unable to explain to me, but I am relieved of the task of considering this unintelligible letter for the reason that all such multilateral agreements will determine by effluxion of time on July 31, 1957. Austins are prepared to give an undertaking to the court not to enter into any such multilateral agreements, and accordingly, if I prolong the period for registration under sections 10 and 13 of the Act until August 1 next, it follows that no such agreements will become subject to registration. The Solicitor-General does not oppose this course.

Conceding that at any rate the multilateral agreements would be subject to registration, apart from the arrangement I have just mentioned, on February 26, 1957, by way of providing a test case, Austins entered into new agreements with Car Mart and Southend Motors which purported to regulate the relations of the parties as from August 1, 1956. I will call these "the new "agreements." Similar agreements were entered into with a distributor and with a dealer, both operating in the County of Somerset, but I need not refer to them further. Austins propose to enter into similar bipartite agreements with all their dealers in a form appropriate to each type of dealer on August 1 next.

The new agreements with Car Mart and with Southend Motors respectively are both bipartite. The Solicitor-General concedes that the new agreements satisfy the conditions contained in section 8 (3) of the Act standing by themselves, and therefore Part I does not prima facie apply to them. Whether that is so is the real question in this case.

Nearly all of the clauses in the earlier series of agreements and in the new bipartite agreements are substantially the same, and in many cases identical, but differ in this essential, that, whereas the relationship between Austins and the distributor and Austins and the dealer were practically unaffected, there was no longer any legal nexus between distributor and dealer or between distributor, dealer and retail dealer. I propose to illustrate this by comparing a few clauses in the old tripartite agreement with the new agreements.

The first two sentences of clause 2 of the old tripartite agreement (Austins, distributor, dealer) read as follows: "The dealer "agrees to purchase from the distributor and the distributor "agrees to purchase from the company and resell to the dealer "between the 1st day of August, 1956, and the 31st day of July, "1957, both days inclusive (hereinafter called 'the current "'contract period') such vehicles as may be specified in the "schedule attached hereto, or, if not so specified, as shall form "his proportion of the distributor's allocation of vehicles for the "home market during the said period as notified to him by the "distributor from time to time. The dealer will use his best "endeavours to dispose of at least the quantities so specified and "to promote the sale of the company's vehicles."

The first two sentences of clause 2 of the new agreement between Austins and the distributor read as follows: "The distri"butor agrees to purchase from the company and the company "agrees to sell to the distributor between the 1st day of August, "1956, and the 31st day of July, 1957, both days inclusive "(hereinafter called 'the current contract period') such vehicles "as may be specified in the schedule attached hereto, or, if any "model of vehicle so specified shall cease to be produced by the "company, such other vehicles as the company may by notice "in writing to the distributor substitute for such vehicles no "longer produced, so that the total number of each model "(including substituted models) of vehicle to be purchased here"under shall equal the total number of each model of vehicle "specified in such schedule, and such other vehicle as may be "mutually agreed." That is the same as the old bipartite agreement between Austins and the distributor.

Clause 2 of the new agreement between Austins and the dealer reads as follows: "The dealer agrees to purchase from the com"pany or from such source as the company shall direct and the "company agrees to sell or procure to be sold to the dealer "between the 1st day of August, 1956, and the 31st day of July, "1957, both days inclusive (hereinafter called 'the current con-"'tract period') such vehicles as may be specified in the schedule "attached hereto, or, if any model of vehicle so specified shall "cease to be produced by the company, such other vehicles as "the company may by notice in writing to the dealer substitute "for such vehicles no longer produced, so that the total number "of each model (including substituted models) of vehicles to be "purchased hereunder shall equal the total number of each model "of vehicle specified in such schedule, and such other vehicles "as may be mutually agreed."

By the old tripartite agreement, clause 12, the dealer undertakes that retail dealers and stocking traders appointed under clause 20 shall maintain a stock of demonstration vehicles in good order. By the new agreement with the dealer (clause 10) he gives a similar undertaking as agent of Austins.

In clause 16 (a) of the old tripartite agreement it is provided that Austins will invoice all vehicles to the dealer through the distributor at a discount of 17½ per cent. from Austins' current retail list price. In the new agreement with the dealer (clause 15 (a)) it is provided that Austins will invoice or cause to be invoiced all vehicles to the dealer at a discount of 17½ per cent.

In the old agreement, clause 20 (a), which I have already mentioned, the dealer is to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own, provided it be approved by Austins. In the new agreement (clause 18) the dealer is expressed to appoint retail dealers and stocking traders "as agent and on "behalf of the company" (Austins).

In the old agreement (clause 29) payment of vehicles contracted to be purchased under the agreement is to be paid for in cash through the distributor to Austins. In the new agreement (clause 25) the cash is to be paid "to the company or as the "company shall direct."

It is further to be observed that in certain paragraphs which do not form part of the agreement but which are printed with it under the heading "Please note before signing," this statement appears in both the old and new forms: "6. Distributors must "ensure agreement between dealers regarding the boundaries "of their respective areas. It should only be necessary to refer "such matters to the company if agreement cannot be reached."

There are other striking similarities and significant differences between the old and new agreements, but I have referred to sufficient to illustrate the argument of the Solicitor-General.

His submission on behalf of the registrar is that the new agreements with the distributor (Car Mart) and with the dealer (Southend Motors) respectively fall within Part I of the Act and are subject to registration. He draws my attention to four special features in this case.

First, he submits that until the change attempted in November, 1956, the real basis of Austins' method of doing the business of selling its cars to the public was by a series of multipartite agreements with its various appointed dealers. That, in my judgment, is a perfectly fair comment.

Secondly, it is submitted that in substance there is no evidence of any desire on the part of Austins or any of their dealers to make any change in the way business is done, and the flow of cars sold to the public is still precisely the same, that is to say, Austins to distributor, who takes four per cent. discount, to dealer, who takes two per cent. discount, to retail dealer, who effects the sale and receives 17½ per cent., although, of course, many sales are made direct to the public at the full retail price by distributors and dealers and, apparently, by Austins themselves.

The dealers still remain bound to Austins by the same restrictions as before, for example, on price to be offered for second-hand cars, though the formula differs slightly (see clause 16 (a)), in dealing with other makes of car, in prohibition on export and in many other ways. The provisions as to providing show and demonstration models, arrangements as to after-sales service, spare parts and other matters also remain identical or substantially the same. I agree with that as a statement of substance.

Thirdly, he submits that the commercial efficiency of the whole selling organization depends on the existence of these parallel agreements. No one would enter into these agreements containing their many restrictions on resale and price control, dealing with other makes of car and second-hand prices (to mention only a few), unless all other dealers dealing in Austin motor-cars were doing likewise. I dare say that is true.

Fourthly, if you look at the whole pattern of the arrangement, it involves an acknowledgment on the part of each agent of the terms of the agreement by which every other agent is bound.

Thus, the Solicitor-General submits that you find originally a series of multipartite agreements and a desire to maintain that sales structure, but it becomes inconvenient having regard to the operation of the Act; solely to avoid its operation, as is shown by the concluding clause of August 1, 1956, series of agreements, the agreements are turned from multilateral agreements and will now undoubtedly become, as a matter of legal form, a series of bipartite agreements; but there is no real intention to change the substances of the whole arrangement and these new agreements must be read in the light of the history and the acknowledged reason for the change. It is submitted that you then find that the real arrangement between the parties is maintained as before, not perhaps any longer as an agreement enforceable at law, but nevertheless as an arrangement or gentlemen's agreement or arrangement, as it is frequently called, falling within section 6 (3) of the Act.

Let me read that subsection once again: [His Lordship read the subsection and continued:]

The Solicitor-General referred me to some observations of Lord Dunedin in *Dunlop Pneumatic Rubber Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*,[2] and submitted that really Austins might be regarded as the agent of the distributors and dealers to ensure that by this network of bipartite agreements the real mutual interdependence of the agreements is maintained. I cannot, however, so regard that submission as justified on the facts of this case. Austins were not in any sense acting as agents for its own dealers. Austins call the tune.

Then I was referred to certain building scheme cases, but I do not think that they help in this case. Building schemes appear in the reports in many guises and forms, but there runs through all of them the basic fact that you must find an intention that each purchaser buys his plot of land on the footing that he is entitled to the benefit of the restrictions against all other owners and is in his turn bound to observe them for the benefit of all the others. The essence is mutual contract.

The whole question here is whether there is or is not a mutual contract or arrangement, whether enforceable at law or not. I do not propose to attempt any definition of " arrangement " in section 6 (3). But to escape the alleviation afforded to the subject by section 8 (3), some arrangement binding three or more parties must be spelt out of the facts, it being conceded that the conditions of the subsection are otherwise satisfied. Whether enforceable at law or not, it seems to me that an arrangement must at least connote an arrangement whereby the parties to it accept mutual rights and obligations.

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[2] [1915] A.C. 847, 855.

Reading these new agreements alone and without reference to the earlier history of the matter, it is clear that each of them falls within the protection afforded by section 8 (3), and the Solicitor-General does not dispute that. He seeks, however, by reference to the four special features mentioned earlier, to alter the proper interpretation and operation of these new agreements and, reading them together, to spell out of them a mutual agreement or arrangement between distributor and dealer. That does not seem to me permissible in law. While every agreement must be read in the light of surrounding circumstances, those circumstances cannot be invoked to alter the true interpretation of a document, or two or more documents, whose operation is clear and unambiguous.

There is, I think, a certain analogy between this case and *Inland Revenue Commissioners* v. *Westminster* (*Duke of*),[3] although there are many differences between that case and this. The truth is, it seems to me, that in this case Austins, to avoid the consequences of liability to registration, has altered the legal framework of its agreements with its dealers, but those new agreements now define and regulate the transactions between the parties; multipartite agreements have gone and, as a matter of law, reference to history cannot resuscitate them.

I could well understand that, in the light of the four special features, the Solicitor-General might have asked me to infer as a fact that in truth the new agreements did not include the whole of the arrangements between the parties; that in truth there was a continuance of the old multipartite arrangement, an arrangement still continuing between Austins, the distributor, the dealer and retail dealer, an arrangement unenforceable at law, a gentlemen's arrangement, dark, secret and hidden, but nevertheless an arrangement which went beyond and outside the four walls of the new agreements.

Such a submission, however, was never made. As I pointed out in the course of argument, had such a submission been made, I must have allowed Austins, their distributors, dealers, retail dealers and so on to bring evidence, if they so desired, to rebut the inference which I was being asked to draw; that evidence would, of course, be open to cross-examination on behalf of the Registrar, but the Solicitor-General disclaimed any desire to conduct such cross-examination.

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[3] [1936] A.C. 1; 51 T.L.R. 467.

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AUSTIN MOTOR-CAR CO. LTD.'S AGREEMENTS, *In re.*

In the circumstances, I can only take the new agreements as they stand. On the facts of this case they contain the whole of the arrangements between the parties, no further or collateral arrangement being alleged. On their true construction they are excepted from the operation of Part I of the Act and, in my judgment, are not subject to registration.

Declaration accordingly.

Solicitors: *Osmond, Bard & Westbrook; Treasury Solicitor.*

J. L. D.

1957
July 22

Roxburgh J.

In re HIBERNIAN MERCHANTS LTD.

Company—Winding up—Unregistered company—Company incorporated in Republic of Ireland—English assets—Form of order.

H. M. Ltd. was a company incorporated in the Republic of Ireland and having a place of business and assets in the United Kingdom. It was an unregistered company within section 399 (1) of the Companies Act, 1948. On the hearing of a creditors' petition for winding up, it was submitted that the following words should be inserted in the winding-up order: "That the liquidator shall "not act in pursuance of the order except for the purpose of "getting in the English assets and settling a list of the English "creditors without applying to the court for directions":—

Held, that it was not desirable to insert any special provision in the winding-up order in this particular case although there was nothing necessarily ultra vires in the form of order proposed by the petitioner provided that it was construed as not in any way limiting the effect of the winding-up order but merely as reserving to the court certain matters in respect whereof a liquidator was always at liberty to apply to the court if he so wished.

In re Commercial Bank of South Australia Ltd. (1886) 33 Ch.D. 174; 2 T.L.R. 714 explained.

PETITION TO WIND UP.

The Commissioners of Customs and Excise, with the support of the Commissioners of Inland Revenue, petitioned the court for the winding up of Hibernian Merchants Ltd., a company of which they were both creditors. In June, 1952, Hibernian

Merchants Ltd. was incorporated in the Republic of Ireland under the Companies Act, 1948. It established a place of business in the United Kingdom—the last known place being in Manchester—but its registered office was in Dublin.

Since August, 1956, the company had been in voluntary liquidation in Ireland and proceedings were before the Irish courts for a creditors' compulsory winding up. The deficiency in its assets amounted to some £39,144. On May 28, 1957, the Commissioners of Customs and Excise started an action in the Queen's Bench Division for purchase tax due to them from the company amounting to some £901. No appearance was entered by the company, and the plaintiffs obtained judgment for that sum and costs. Application for payment had been made unsuccessfully.

On the hearing of a petition to wind up the company counsel on behalf of the Customs and Excise submitted that the following words should be inserted in the winding-up order: "That the "liquidator shall not act in pursuance of the order except for "the purpose of getting in the English assets and settling a list "of the English creditors without applying to the court for "directions."

Denys Buckley for the Commissioners of Customs and Excise. The form of order asked for followed the course adopted by North J. in *In re Commercial Bank of South Australia Ltd.*,[1] upon the footing that, the company being already in liquidation in Ireland, the court would not wish its order in any way to conflict with the Irish liquidation.

Ian Edwards-Jones for the Commissioners of Inland Revenue, a supporting creditor. It is settled law that there is jurisdiction to make a winding-up order in such a case as this. *In re Matheson Brothers Ltd.*[2] suggests that in exercising the jurisdiction the court will consider whether on principles of international comity, and on the evidence, the usual form of order should be modified in any way so as to prevent discourtesy to the foreign court or embarrassment. Whilst it is proper that the court be referred to the authorities and to the evidence, the supporting creditor is not asking that the order here be in a special form. It may well be that the evidence here discloses no sufficient reason for a departure from the usual form of order, which would be entirely satisfactory to the supporting creditor.

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[1] (1886) 33 Ch.D. 174; 2 T.L.R. 714.

[2] (1884) 27 Ch.D. 225.

ROXBURGH J. This is a petition which I am satisfied was duly served by the Commissioners of Customs and Excise, who are judgment creditors of Hibernian Merchants Ltd., and they have the support of the Commissioners of Inland Revenue, who are creditors for £864. The special feature of the case is that the company is an Irish Free State company and it is now in liquidation. It was not, however, in liquidation at the date when this petition was served.

The matter assumes some importance for this reason: to the winding up of this company (which is an unregistered company within the meaning of the Companies Act, 1948) section 399 (1) applies. That section, which for the present purpose is indistinguishable from section 199 of the Companies Act, 1862, provides as follows: "(1) Subject to the provisions of this Part "of this Act, any unregistered company may be wound up under "this Act." It is plain from these words that the court has some kind of discretion. It is not material for the present purpose precisely what are the boundaries of that discretion, but the word "may" must import some discretion. The subsection continues: "and all the provisions of this Act with respect to "winding up shall apply to an unregistered company, with the "exceptions and additions mentioned in the following provisions "of this section." I cannot see that those words can be treated as otherwise than mandatory. They are, in my view, as imperative as language can make them. If that be so, then the court has no power to attach to the winding-up order any provisions which would have an effect contrary to the provisions contained in the Act unless such exceptions and additions could be found in the following provisions of section 399, and no one suggests that what I am concerned with today is to be found there.

Mr. Buckley is prepared to concede that what Vaughan Williams J. is reported to have said in *In re Federal Bank of Australia*[1] does go too far, and I am certainly of that opinion, because there the court had before it a winding-up petition. Vaughan Williams J. said[2]: "I think that the right order for "me to make is an order for compulsory winding up, with the "limitations introduced in the order in *In re Commercial Bank of*

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[1] [1893] W.N. 46; 62 L.J.Ch. 561.

[2] 62 L.J.Ch. 561, 563.

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HIBERNIAN MERCHANTS LTD., *In re.*

Roxburgh J.

"*South Australia Ltd.*"[3] [The powers of the English liquidator were limited to taking possession of, collecting and protecting the English assets, with liberty to apply in chambers.] "I "think that the best thing I can do in the interest of everybody "concerned is to make a compulsory order, a consequence of "which will be that the official receiver will be the liquidator. I "shall limit his authority in the way I have already indicated."

The order was directed not to be drawn up for a fortnight, in order to give the bank an opportunity to appeal.

I think that something in the nature of what North J. did in *In re Commercial Bank of South Australia Ltd.*,[4] the case to which Vaughan Williams J. referred, could be done, if desirable, in a winding-up order. It is important to consider carefully what North J. said in that case. The report is that of the adjourned hearing of a winding-up petition. North J. said[5]: "I do not "think it would be right to insert any special directions in the "order; this is not the proper time for giving such directions," and that is clear enough. Then he went on[6]: "But I will say "this, that I think the winding up here will be ancillary to a "winding up in Australia, and, if I have the control of the "proceedings here, I will take care that there shall be no "conflict between the two courts." If I may say so, that indicates so far that he is not going to put anything at all about this in the order, but that he is merely giving an indication of how in his judgment the winding up ought to be conducted by the liquidator. Then he went on[7]: "I do not think that I ought "to insert any special directions in the order." He continued—and this, no doubt, is the foundation for the suggestion that something was put in the order in spite of the judge having twice said that he was not going to put anything in the order—"But "I think that the liquidator ought not to act without the special "directions of the judge in chambers, except for the purpose "of getting in the English assets and settling a list of the "English creditors." If he did put that in the order, he had obviously violated what he had himself twice said. For my own part, I should believe that that refers back to what he said before in more detail as to what he would do if he had control of the proceedings. But if he did put anything in the order, I do not think that there is necessarily anything ultra vires in such an order, provided that it is always construed not as in any

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[3] (1886) 33 Ch.D. 174; 2 T.L.R. 714.

[4] Ibid.

[5] 33 Ch.D. 174, 178.

[6] Ibid.

[7] Ibid.

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HIBERNIAN MERCHANTS LTD., *In re.*

Roxburgh J.

way limiting the effect of the winding-up order but as reserving specially to the court certain matters in respect of which a liquidator is always at liberty to apply to the court under the general law if he desires to do so. If the order be so construed it cannot, in my judgment, offend the statute; and I would construe the order of North J., which I have not seen, as probably having no more effect than that. But he knew a good deal more than I do in this case about the position in the liquidation.

There were some special circumstances in *In re Commercial Bank of South Australia Ltd.*,[8] as will appear from a perusal of the judgment. I have no idea whether any similar circumstances exist in the present case. I think that it is better to trust the Official Receiver to make an application to the court if and when he thinks it is desirable rather than fetter him in advance in circumstances about which the court knows very little. I can well imagine that in many cases, even if there is a question of a principal and an ancillary jurisdiction, the Official Receiver will not find it difficult to carry out his duties under the Companies Act without any application to the court, and in such a case the reservation in the order will merely waste money. In other cases, no doubt, it may be extremely difficult, but then surely it is better to decide what is to be done with the facts in evidence than to decide what is to be done in advance of knowledge of the facts.

Therefore, while I am satisfied that an order, which does no more than did the order in *In re Commercial Bank of South Australia Ltd.*,[9] is within the powers of the court, I do not think it desirable to put any special provision in the winding-up order; but I am most indebted to counsel who have given me much assistance on a point which I certainly wished to explore in the circumstances to which I have already alluded. The order will be the ordinary order.

Petition granted.

Solicitors: *Solicitor, Commissioners of Customs and Excise; Solicitor, Inland Revenue.*

P. P.

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[8] 33 Ch.D 174.

[9] Ibid.

In re A DEBTOR, No. 80 OF 1957.

C. A.

1957
May 28, 29.

Jenkins and Sellers L.JJ., Roxburgh J.

Bankruptcy — Act of — Judgment unsatisfied — "Cross demand" — Pending proceedings in Divorce Division under section 17 *of Married Women's Property Act,* 1882, *by debtor against wife— Subsequently, judgment obtained by wife against debtor in other proceedings — Application by debtor to have notice set aside — Whether claim under section* 17 *of the Act of* 1882 *a "cross "demand" — Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1 (1) (*g*).

Husband and Wife—Property—Proceedings under section 17.

In proceedings brought under section 17 of the Married Women's Property Act, 1882, and pending in the Divorce Division, a debtor claimed against his wife the whole of the contents of the matrimonial home and certain jewellery which he estimated to be worth in the aggregate £20,000. The wife resisted the debtor's claim and estimated the value of the chattels at £6,000. Subsequent to the institution of these proceedings the wife obtained judgment against the debtor in other proceedings for £636 15s. 4d. in respect of which she issued a bankruptcy notice. On an application by the debtor under section 1 (1) (*g*) of the Bankruptcy Act, 1914,[1] to have the bankruptcy notice set aside:—

Held (Jenkins L.J. dissenting), that a claim under section 17 of the Married Women's Property Act, 1882, was capable of being a "cross demand" within the meaning of paragraph (*g*); that the court must be satisfied that the debtor had a cross demand which equalled or exceeded the amount of the judgment debt, and for that purpose it should appear probable that the debtor would establish his claim against his wife personally for such amount; and that, in the circumstances of this case, the bankruptcy notice ought to be set aside.

In re a Bankruptcy Notice [1934] Ch. 431; 50 T.L.R. 333 considered.

Per Roxburgh J. For the purposes of satisfying section 1 (1) (*g*) not every demand will suffice. The debtor must satisfy the court that he has a genuine demand, and, further, that it has a reasonable probability of success.

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[1] Bankruptcy Act, 1914, s. 1: "(1) A debtor commits an act of "bankruptcy in each of the following "cases:—. . . (*g*) If a creditor has "obtained a final judgment or final "order against him for any amount, "and, execution thereon not having "been stayed, has served on him in "England, or, by leave of the court, "elsewhere, a bankruptcy notice "under this Act, and he does not, "within seven days after service of "the notice, in case the service is "effected in England, and in case the "service is effected elsewhere, then "within the time limited in that "behalf by the order giving leave to "effect the service, either comply "with the requirements of the notice "or satisfy the court that he has "a counter-claim set-off or cross "demand which equals or exceeds the "amount of the judgment debt or sum "ordered to be paid, and which he "could not set up in the action in "which the judgment was obtained, "or the proceedings in which the "order was obtained: . . ."

C. A.

1957

A DEBTOR, No. 80 OF 1957, *In re.*

APPEAL from an order of Mr. Registrar Bowyer, dated March 14, 1957, whereby he refused the debtor's application to have a bankruptcy notice set aside.

The following statement of facts is taken from the judgment of Jenkins L.J.: The bankruptcy notice, which was dated January 10, 1957, was issued at the instance of the debtor's wife, and it was in respect of a judgment debt of £636 15s. 4d., the judgment having been obtained against him by his wife in these circumstances. It appeared that a firm of grocers named Coopers had been supplying the spouses with groceries and household necessaries for the matrimonial establishment. The goods were supplied on credit and a large amount of indebtedness accumulated which the debtor omitted to pay. In these circumstances Coopers brought a county court action against the debtor and his wife claiming the amount due to them for goods sold and delivered. For some reason the county court action was pursued against the wife alone and she suffered judgment for the amount of Coopers' claim. She contended that inasmuch as these goods were in the nature of household necessaries, the liability ought properly to fall on the debtor. She brought him in as a third party on the ground that she was entitled to be indemnified by him, and in the result she recovered the judgment upon which the bankruptcy notice was founded, the amount of it representing five-sixths of Messrs. Coopers' claim together with costs.

The application to set the bankruptcy notice aside was founded upon the terms of section 1 (1) (*g*) of the Bankruptcy Act, 1914. The debtor claimed that he had a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt upon which the bankruptcy notice was founded. He relied in particular upon the words "cross demand" as being of a wider connotation than either the word "counter-claim" or the word "set-off."

The nature of the cross demand on which the debtor relied was this. There were unfortunate matrimonial differences between the spouses and on November 4, 1955, the wife presented a petition for the dissolution of their marriage. That suit was defended by the debtor. Shortly after the institution of the divorce proceedings the debtor made an application in the Divorce Division under section 17 of the Married Women's Property Act, 1882, to have the title of the parties to a quantity of furniture, jewellery and other chattels at the matrimonial home determined by the court. Those proceedings were still pending and shortly the position was that the debtor claimed that substantially the whole of the contents of the matrimonial home, including some jewellery worth altogether, in the debtor's estimation, some £20,000, belonged to the debtor. The wife, on the other hand, set the value of £6,000 upon the chattels in question and claimed that they all belonged to her. The debtor contended that his claim in the proceedings under section 17 was within the meaning of section 1 (1) (*g*) of the Bankruptcy Act, 1914, a cross demand; and he said further that it was reasonable to suppose that the result of the proceedings under section 17 of the Married Women's Property Act, 1882, must be to establish his title to some part, at all events, of the chattels, and at worst to chattels at least equal to or exceeding in value the amount of the judgment debt. Therefore, he said that he had a cross demand on the strength of which the bankruptcy notice should be set aside.

In paragraph 2 of his affidavit in which he referred to the section 17 proceedings the debtor stated: "Prior to the commencement of the proceedings referred to in the preceding paragraph" —those were the proceedings leading to the judgment obtained against him by his wife and the service of the bankruptcy notice— "my wife on November 4, 1955, presented a petition against me "for dissolution of the marriage in the High Court of Justice, Probate, Divorce and Admiralty Division. I am defending those "proceedings which, although they have been set down for hearing "in the Defended List, have since been taken out and interlocutory proceedings are pending. Moreover, in November, 1955, "I commenced proceedings in the Divorce Division of this "Honourable Court under section 17 of the Married Women's "Property Act, 1882, claiming against my wife the ownership of "the whole of the contents of the flat and certain jewellery, all "of which was purchased with my own money, she having no "moneys of her own at the material time, and secured an "injunction against my wife to restrain her from selling or parting "with or in any way dealing with such contents and jewellery. "The value of such contents and jewellery is approximately "£20,000, and by order of the said Division of this Honourable "Court on February 12, 1956, my wife is required to file an "affidavit stating the grounds upon which she claims ownership "of the contents and jewellery or any part thereof, and to deliver "a Scott Schedule in respect of such contents and jewellery. "Such proceedings were brought by me at a time when I discovered that my wife was attempting to remove and sell "approximately £1,500 silver from the flat, and in March, 1956, "she removed from the matrimonial home the entire contents "including all my personal property such as my golf clubs, my "library, my wines, my desk, my safe and contents, papers, "documents, etc."

To that the wife made answer in her affidavit, paragraph 3: "I admit that my husband has instituted proceedings under the "Married Women's Property Acts for the property in the marital "home including jewellery. The said property is probably worth "about £6,000. I say that all such property belongs to me on "the ground that I bought some items and had the rest given "to me by my husband and other persons. I do not admit "attempting to remove the silver as alleged by my husband. "What in fact happened was that I found my husband trying "to remove the silver in his car and I only prevented him doing "so by holding onto the car. The police had to be called to "restrain my husband. I have since had the property removed "to my present address. (4) I have been directed to file an "affidavit in the proceedings aforesaid as stated by my husband, "but it is he who has been directed to prepare a Scott Schedule. "(5) I submit that my husband's claim to the contents of our "home, which as aforesaid is already the subject of proceedings, "is not a counter-claim, set-off or cross demand." She went on to say that as the section 17 claim would not be tried for a considerable time, it was not equitable that she should in the meantime be deprived of the right to enforce the judgment she had obtained against her husband in respect of the food and provisions supplied.

A. C. Sparrow for the debtor, the husband. The claim under section 17 of the Married Women's Property Act, 1882, could not have been raised by way of counter-claim, set-off or cross demand in the county court action in which the judgment was obtained. Further, the husband could not sue his wife in tort in respect of the chattels: section 12 of the Married Women's Property Act, 1882. Nevertheless, for the purposes of section 1 (1) (*g*) of the Bankruptcy Act, 1914, the husband's claim against the wife is a demand, and inasmuch as it is against the wife and not a third party, it is a "cross demand." It is conceded that the debtor must show that his claim is bona fide.

In re a Bankruptcy Notice [2] is distinguishable, for it was decided on the basis that the claim it was desired to set up was a claim against a third party and not against the creditor.

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[2] [1934] Ch. 431.

" Cross demand " is not a term of art; it has a wider connotation than counter-claim. It would appear from the judgments in *In re a Bankruptcy Notice*,[3] although the Court of Appeal did not decide the question, that a " cross demand " is not confined to a money claim. The relevant words of section 1 (1) (*g*) are " counter-claim set-off or cross demand." " Set-off " is plainly a money item, but a counter-claim is not so confined, nor is a " cross demand "; the latter words are plainly contrasted with " set-off."

In his affidavit the husband has declared that he is entitled to all the chattels in dispute in the section 17 proceedings. True he has not described them with particularity, nevertheless it is submitted that his claim cannot be dismissed as frivolous or fraudulent. He has estimated the value of the chattels to be £20,000; there is every possibility, therefore, that his claim in respect of them will be adjudged to exceed greatly this debt of £636. It is conceded that a discretion is conferred on the court in section 17 proceedings, but that discretion does not go so far as to enable the court to vary agreed or established rights to property: *Cobb* v. *Cobb*[4] and *Fribance* v. *Fribance* (*No.* 2).[5] Accordingly, the husband has a cross demand equal to or exceeding the amount of the judgment debt, and therefore this bankruptcy notice should be set aside. [Reference was also made to *In re G. E. B.*[6]]

W. A. Bagnall for the creditor, the wife. The word " cross " demand " is to be found as far back as the Bankruptcy Rules, 1886, when " counter-claim " had a much narrower meaning than it has at the present time. If this claim under section 17 was a mere claim in detinue, it might succeed. But this is not a demand against the wife. It is purely fortuitous that the property is in the wife's possession; it might have been in the custody of a third party. For a claim to be a " cross demand " within the meaning of the Bankruptcy Act, 1914, it must satisfy the following tests: (1) It must be a claim of right, and not merely a submission to a discretionary jurisdiction. (2) It must be a claim capable of being executed against the creditor personally. (3) It must be a claim capable of quantification. The present claim fails to satisfy the first and second of the above tests. The jurisdiction of the court under section 17 of the Married Women's Property Act, 1882, is restricted to cases where there is identifiable property in dispute and a declaration is sought as to the respective rights of the parties to it. It is no doubt true that if after the court had made a declaration a party to the proceedings refused to give effect to it, the court would not be powerless and would implement the terms of the declaration by contempt proceedings, if necessary. and order restitution of the property in question, but it would not order payment of a sum of money in lieu if the offending party had disposed of the property. Reliance is placed on the observations of Lord Hanworth M.R. and Romer L.J. in *In re a Bankruptcy Notice*[7] in support of the proposition that the present claim under section 17 is not a "cross demand" for the purposes of section 1 (1) (*g*) of the Bankruptcy Act, 1914.

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[3] [1934] Ch. 431, 437, 438, 441.

[4] [1955] 1 W.L.R. 731, 733, 734, 736, 737; [1955] 2 All E.R. 696.

[5] [1957] 1 W.L.R. 384, 387.

[6] [1903] 2 K.B. 340; 89 L.T. 245.

The wife here has denied that any of the chattels are the property of the husband. It is conceded that if the wife made an admission in relation to any of these chattels in favour of the husband's title to them, there would cease to be a dispute in respect of the subject-matter of the admission and it would form the basis of a valid "cross demand" in the event of the wife serving a bankruptcy notice upon him. Similarly, if the husband lent the wife a sum of money on terms that it was to be repaid at the end of a named period. If the wife refused to refund the loan, the husband would plainly have a claim in contract for its return, and such a claim, being a claim of right, would constitute a "cross demand."

The court has a wide discretion under section 17 of the Act of 1882 (see *per* Evershed M.R. in *Rimmer* v. *Rimmer*[8]), and in the existing state of the evidence it cannot be asserted that the husband will make good his claim to property equal to or exceeding in value the amount of this judgment debt.

Sparrow, in reply, referred to *Tunstall* v. *Tunstall*.[9]

JENKINS L.J. referred to the facts as set out above and continued: We were told in the course of the hearing, but I do not think it is actually in evidence, that in the section 17 proceedings the wife has been put upon an undertaking, in effect, not to part with or deal with the disputed chattels pending the decision of the court. Those are, I think, all the material facts, and it will be observed that there is an acute conflict of evidence between the spouses, as is only too common in these cases, in regard to this matter of the contents of the matrimonial home and the jewellery. Not only does the husband put the value of this property at

[7] [1934] Ch. 431, 438, 439.

[8] [1953] 1 Q.B. 63, 68.

[9] [1953] 1 W.L.R. 770.

£20,000, whereas the wife puts it at £6,000, but there is a direct conflict as to the ownership of the property in question.

I should, I think, next refer to section 17 of the Married Women's Property Act, 1882. I should notice in passing section 12, which, it is agreed, has the effect of precluding the husband from bringing any proceedings in tort against his wife in respect of the chattels in dispute. The sidenote to section 17 says: "Questions between husband and wife as to property to be "decided in a summary way," and so far as material for the present purposes the section is in these terms: "In any question "between husband and wife as to the title to or possession of "property, either party . . . may apply by summons or otherwise "in a summary way to any judge of the High Court of Justice . . . "and the judge of the High Court of Justice . . . may make such "order with respect to the property in dispute, and as to the costs "of and consequent on the application as he thinks fit, . . ." It will be observed that the section is couched in language calculated to give the judge who deals with the matter a discretion as to the nature and form of any order he may make.

The debtor, then, asserts that his claim to the furniture, or at all events to a part of it which is equal to or exceeds in value the amount of the judgment debt, is a counter-claim, set-off or cross demand, in particular a cross demand, within the meaning of section 1 (1) (*g*) of the Bankruptcy Act, 1914. In the course of the discussion of this question we were referred to a number of authorities. There were two bankruptcy cases and the first in date is *In re G. E. B.*[1] The effect of that case, as I understand it, was that the question whether there is a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt must be determined at the date of the hearing of the application to set aside the bankruptcy notice. It must be shown that at that point of time the debtor had a valid and subsisting counter-claim, set-off or cross demand.

The next case to which we were referred in order of date was the case in the Court of Appeal of *In re a Bankruptcy Notice.*[2] The facts of that case were very different from the facts of the present case, but very briefly the position seems to have been that the debtor had instituted proceedings in the Chancery Division in which he claimed to be subrogated in respect of certain mortgage securities. The creditor was a party to the action, I understand, but no relief was sought against the creditor personally. After that action had been proceeding for some time the creditor brought an action about a different matter against the debtor and recovered judgment, and the question was whether the debtor's claim to subrogation in respect of certain securities in the Chancery action was a counter-claim, set-off or cross demand.

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[1] [1903] 2 K.B. 340; 89 L.T. 245.

[2] [1934] Ch. 431.

Lord Hanworth M.R., in the course of his judgment, discussed the meaning of the words "counter-claim, set-off or cross "demand," and came to the conclusion that "cross demand" was a term of wider import than "counter-claim" or "set-off." Lord Hanworth said [3]: "The question really turns upon whether "or not the proceedings, which are now taken and which are "reaching an end in the Chancery Division, provide 'a counter-"'claim, set-off or cross-demand which equals or exceeds the "'amount of the judgment debt.' At the conclusion of them it "may be that the plaintiff will have established that he is "entitled to receive the money, £1,350 and £1,401. But, although "that may be ultimately paid to him, is that such a counter-"claim, set-off or cross-demand, with the concomitant condition "that it equals or exceeds the amount of the judgment debt, that "it overtops or cancels out the creditor's right to have the debt "in respect of which he has a judgment paid by means of the "execution provided under a bankruptcy notice?

"Now one can deal quite shortly with these three points. It "is unnecessary at the present moment to define precisely what "is meant by those words. What claims are included in the "words 'counter-claim, set-off or cross-demand'? With regard "to the word 'set-off,' that is a word well known and established "in its meaning; it is something which provides a defence because "the nature and quality of the sum so relied upon are such "that it is a sum which is proper to be dealt with as diminishing "the claim which is made, and against which the sum so "demanded can be set off. With regard to a counterclaim, that "is a creature of the Supreme Court of Judicature Act, 1873. "By section 24 (3), it was provided that the courts should have "the power to hear a counter-claim, a matter which could not "until that time have been included in the same action."

Then Lord Hanworth having discussed the meaning of the word "counter-claim" went on to deal with "cross demand": "I turn, therefore, to what to my mind is the wider word, 'cross "'demand.' If a cross demand is only to be interpreted as mean-"ing something which could have been introduced into the action

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[3] [1934] Ch. 431, 437, 438.

"by way of counter-claim, it adds nothing to the word 'counter-"'claim.' 'Cross demand' seems to me to be a word introduced "in order to give a wider ambit to the meaning of these claims, "something that would not be described, certainly, as a set-off, "something that could not have been brought in the action, some-"thing that still lies outside a counter-claim, but is of a nature "which can be specified, and which is of such a nature that it "equals or exceeds the amount of the judgment debt. I do not "desire to say what 'cross demand' may include, but it is not "difficult to say that it does not include a claim of such uncertain "nature as appears in these Chancery proceedings. That claim "does not appear to be one which it would be proper to describe "as a cross demand; it is a claim of right which may inure "ultimately for the benefit of the judgment debtor. Therefore, "it appears that there is no sufficient ground for setting aside "this bankruptcy notice; the bankruptcy notice stands good and "must be complied with." In the result, therefore, Lord Hanworth, while expressing the view that a cross demand was a wider matter than a counter-claim or set-off, held that in that case the uncertainty as to the result of the Chancery proceedings was such that whatever benefit the debtor might ultimately derive from them could not be held properly to rank as a cross demand.

Romer L.J. said[4]: "Strictly, of course, a claim or a demand "cannot exceed or be equal to or less than the amount of the "judgment debt; it is obviously the thing which is claimed or "demanded that has to be compared with the amount of the "judgment debt. Some things that are claimed or demanded "obviously cannot be compared with the amount of the judgment "debt. It would be impossible to say that a declaration or an "injunction could equal or exceed the amount of a judgment "debt, and there are obviously other things which cannot be "compared with the amount of a judgment debt. These words "seem to me to refer to a case where the judgment debtor is "claiming to receive from the judgment creditor something which "can properly be said to equal or exceed the amount of the "judgment debt." Those words of Romer L.J. seem to me to imply that there may be a cross demand in respect of a chattel as distinct from a sum of money provided that the chattel is one upon which a value can be set so as to make it capable of being compared with the amount of the judgment debt on which the bankruptcy notice is founded. But he decided against the debtor in that case on the ground, as I understand it, that the claim

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[4] [1934] Ch. 431, 439.

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which the debtor sought to use as a cross demand involved a third party, a cross demand, in his view, under the provisions of section 1 (1) (*g*) of the 1914 Act being confined to a cross demand between the debtor and the creditor.

Then Maugham L.J. said[5]: "With regard to the words " 'which equals or exceeds the amount of the judgment debt,' I " agree with Romer L.J. that that must mean or refer to a claim " against the creditor, either for money, or, at any rate, for " money or property of value which equals or exceeds the amount " of the judgment debt. For instance, it is possible, although " the question does not arise here, if the creditor possessed a bag " of diamonds belonging to the debtor of a value exceeding the " amount of the judgment debt, this bankruptcy notice would be " set aside. That, as I say, may very well be the case. If we are " considering the word 'cross demand' in the present case, it has " to be a cross demand against the creditor effective at the time " of the hearing of the application to set aside the bankruptcy " notice, either for an amount equal to or exceeding the amount " of the judgment debt or, at any rate, for property of the value " which at that moment exceeds the amount of the judgment " debt." Then upon those grounds he came to the conclusion, like the other members of the court, that there was no cross demand made out in that case.

From these authorities upon the relevant provision of the Bankruptcy Act it appears that a "cross demand" is a term of wide import extending to matters which would not be covered by the expressions "counter-claim" or "set-off," and it appears further that a cross demand may be made in respect of a chattel on which it is possible to set a value.

Then we were referred to a number of cases under the Married Women's Property Act, that is to say, concerning applications under section 17 of that Act. I will first refer to *Tunstall* v. *Tunstall*[6] for this statement by Lord Goddard C.J.: "If the " application is in regard to chattels, or to stocks and shares " (because they are specially mentioned in the section),"—the section being section 17—" the judge could, no doubt, make an " order and say: 'That piece of property is to be handed over by " 'the husband,' or 'these shares standing at present in the " 'husband's name in part or in whole are to be transferred to " 'the wife.' That he could do. And no doubt if the husband " refused to obey that order he could be attached. But I can

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[5] [1934] Ch. 431, 441.

[6] [1953] 1 W.L.R. 770, 772; [1953] 2 All E.R. 310.

"see nothing in this section which gives the court power to give "what is equivalent to a judgment for a sum of money."

The other cases bearing upon section 17 of the Married Women's Property Act, 1882, to which we were referred were cited on the question how far the making of any order under section 17 of the Married Women's Property Act, 1882, and the terms of any order so made were matters for the discretion of the court. It was agreed in discussion that none of these cases by any means goes the length of saying that the judge charged with dealing with such an application can disregard a claim of legal right, but admittedly the cases do show that in matters concerning property jointly acquired or jointly used, the court may have a wide discretion to deal with it in such manner as will be fair and equitable as between the parties having regard to the whole history as to the acquisition and use of the chattels in question, and, indeed, to all the surrounding circumstances of the matrimonial life of the parties.

I do not propose to take up time by citing all of these authorities, but I would refer to *Rimmer* v. *Rimmer*[7] for a quotation from a judgment of Bucknill L.J., which is made by the Master of the Rolls: "It is appropriate to remember "what it is that the Act calls on the court to do. The relevant "part of section 17 says: 'In any question between husband and "'wife as to the title to or possession of property, either party . . . "'may apply by summons or otherwise in a summary way to "'any judge of the High Court of Justice in England or in "'Ireland . . . who may make such order with respect to the "'property in dispute, and as to the costs of and consequent on "'the application, as he thinks fit.' So the problem posed is, in "the present case, what order is now a fit order to make in "regard to a sum of £2,117, being the proceeds of sale of a "house which was the matrimonial home?

"That is the problem, and in regard to it I venture to take "as my guide or test the observations of a wise judge, Bucknill "L.J., in a case which I think is not reported, of *Newgrosh* v. "*Newgrosh*,[8] decided on June 28, 1950. Bucknill L.J. said: "'That'—and he referred to the citation I have just made— "'gives the judge a wide power to do what he thinks under the "'circumstances is fair and just. I do not think it entitles him "'to make an order which is contrary to any well-established

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[7] [1953] 1 Q.B. 63, 68; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

[8] 100 L.J. 525.

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" 'principle of law, but, subject to that, I should have thought " 'that disputes between husband and wife as to who owns pro- " 'perty which at one time, at any rate, they have been using in " 'common are disputes which may very well be dealt with by " 'the principle which has been described here as " Palm Tree " ' " Justice." I understand that to be justice which makes " 'orders which appear to be fair and just in the special circum- " 'stances of the case.' "

Those, I think, are all the authorities to which I need refer, and on the facts and the authorities the argument of Mr. Sparrow, for the debtor, was to this effect: This claim in respect of the chattels under section 17 of the Married Women's Property Act, 1882, is admittedly not a matter which could have been raised by way of counter-claim, set-off or cross demand in the action in which the judgment was obtained. It is likewise common ground that the debtor could not sue his wife in tort in respect of the disputed chattels; but that, says Mr. Sparrow, merely reinforces the proposition that the claim could not have been raised in the action. So far, therefore, the case is within section 1 (1) (*g*).

Mr. Sparrow then relies on the observations of Lord Hanworth M.R. as to the width of the expression " cross demand." He relies also on the observations of Romer and Maugham L.JJ., which show that a chattel capable of being valued may be a proper subject of a cross demand. He says that, in instituting the proceedings under the Married Women's Property Act, the debtor made his cross demand, and he made it in respect of chattels capable of being valued. True it is the debtor has not in his evidence described any of the items comprised in the disputed chattels with any degree of particularity; nevertheless, he has put it on his oath that he is entitled to the whole of them; his claim cannot be dismissed as frivolous or fraudulent, and if he has any claim at all in the matter in all reasonable probability the value of the chattels to be adjudged his must far exceed the judgment debt of £636. Accordingly, he says he should be held to have a cross demand in the shape of his claim to the furniture equal to or exceeding the amount of the judgment debt.

On the side of the wife, Mr. Bagnall, amongst other submissions, relied on the wide discretion reposed in the court under section 17 of the Married Women's Property Act, 1882, and he said that having regard to that wide discretion and in the existing state of the evidence it could not be asserted that the husband would make good his claim to any of the chattels or to chattels equal to or exceeding in value the amount of the judgment debt.

In the course of the argument various hypothetical cases were discussed, and Mr. Bagnall admitted that where a wife was wrongfully in possession of a chattel belonging to the husband, that is to say, in possession of a chattel of the husband's admittedly without any title to it beyond perhaps the initial permission of the husband that she should have it in her possession for some purpose, in the event of the wife serving a bankruptcy notice on the husband it might well be open to the husband to claim that the value of that chattel of which the wife was wrongfully in possession provided him with a cross demand against the amount of the judgment. Mr. Bagnall was also, as I understood him, disposed to admit that if a bankruptcy notice was served on the husband and it appeared on his application to set it aside that an order had been made on the wife under the Married Women's Property Act, 1882, enjoining her to hand over certain chattels to him and that order had not been complied with, then the value of the chattels wrongfully held by the wife in defiance of the order of the court might be considered a good cross demand against the judgment debt on which she founded her bankruptcy notice.

We are not here concerned to decide what the position might be in hypothetical cases and hypothetical circumstances. We are concerned with the circumstances of this particular case, and in the circumstances of this particular case, to which I have given the best consideration I can, I am of opinion that the debtor's claim that he has here a cross demand in respect of the furniture is misconceived. I would observe, first, that admittedly the debtor has no money claim against his wife in respect of the chattels; his right is simply to whatever chattels amongst the chattels in dispute the court holds to be his in proceedings under section 17 of the Married Women's Property Act, 1882, and orders her to deliver up. Secondly, I would observe that while the furniture is in the physical possession of the wife she has been put by the court on an undertaking not to part with it pending a decision in the proceedings under section 17 of the Married Women's Property Act, 1882. Her position, therefore, although she is a claiming party, partakes somewhat of the position of a stakeholder. Further, I would observe that while the wife no doubt claims these disputed chattels to be hers and will endeavour to make good that claim in the section 17 proceedings, it cannot be assumed that she will not carry out any order the court may make in relation to the disputed chattels; in other words, the chattels are in medio abiding the order of the court. Further, it is plain that in the proceedings under section 17 the debtor must either fail or succeed; I omit for simplicity the possibility of partial failure or partial success. If he fails he has no cross demand, because the chattels must then be taken not to have been his. If he succeeds then he will get his chattels back and he cannot claim to have, in addition to his chattels, a cross demand for their value as well. If he was able to sue his wife in tort, then on making good his title to the chattels the most he could claim, as I see it, would be damages for their wrongful detention, and such a claim would be difficult to substantiate pending proceedings under section 17 of the Married Women's Property Act, 1882, in which the court, having seisin of the matter, has given its interlocutory directions as to the custody of the chattels. Even if such a claim were possible it cannot be predicated of it that the amount, if any, which could be recovered under that head would be equal to or would exceed the amount of the judgment debt. But all that is on the supposition that the debtor could sue his wife in tort, which admittedly he is unable to do.

Accordingly, to my mind, the conclusion of the whole matter is this. Whether the debtor wins or loses the proceedings under section 17, he has no cross demand in respect of the chattels in respect of which the bankruptcy notice can properly be set aside. For my part, therefore, I am of opinion that the registrar came to a right conclusion in this case and I would dismiss this appeal.

Sellers L.J. In the circumstances which my Lord has so fully and clearly stated, the appellant, the husband, can only succeed in setting aside the bankruptcy notice served on him in accordance with section 1 (1) (*g*) of the Bankruptcy Act, 1914, and avoid its effect as an act of bankruptcy if he can fulfil one of the requirements of the subsection. He has sought to satisfy the court that he has a cross demand which equals or exceeds the amount of the judgment debt. He failed to satisfy Mr. Registrar Bowyer, not because of what might be called the merits of the claim, but because, as I understand it, the facts and circumstances arising here, he thought, did not establish a cross demand. As that is my Lord's opinion also I take a contrary view with great deference. I feel that the words permit of a wider interpretation and would include the husband's claim in this case and I must so express my opinion.

The relevant requirement of section 1 (1) (*g*) is, as my Lord has pointed out, that the debtor must satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained. If a cross claim is set up in an action by a defendant to a claim it is set up by way of counter-claim or set-off. If the debtor's claim against the creditor arises afterwards (and presumably before the bankruptcy notice) it would seem to be of necessity a claim which would have to be made by separate action or proceedings, but such a claim is referred to in the subsection as a counter-claim, set-off or cross demand. Whatever the claim alleged here is, it is conceded that it could not have been set up in the action in which the judgment was obtained. Therefore, the first and vital question is whether it is in its nature a cross demand, to select the most favourable of the expressions used. It is not easy to find a fundamental distinction between cross demand and a cross or counter-claim, but the words are separated by the word "set-off," which has a distinctive character, and may be taken to have a different meaning.

My Lord has referred to *In re a Bankruptcy Notice*[9] and the observations in point made there by the members of the Court of Appeal and I do not cite them afresh. I would make two comments on the case. Its decision has no direct application here because it was a case where there was no claim against the creditor in respect of any personal liability charged against him. I would add for an ulterior purpose a quotation (which is not germane to the direct argument) appearing at the end of Maugham L.J.'s judgment, where he said[10]: "I would only wish to add, following what has been said by the "Master of the Rolls, that it does not therefore follow that there "will be an adjudication, because, contrary to the position with "regard to a receiving order, the court has a judicial discretion "under the Act whether it will or will not adjudicate a man "bankrupt on a creditor's petition. It may be, as he has pointed "out, if the facts are established they will justify the view that "this is not a case in which there should be such an order."

Now the only cross demand which the husband has and seeks to set up is a claim under the Married Women's Property Act, 1882, section 17. It appears that on November 4, 1955, the wife presented a divorce petition against her husband and some time in the same month the husband took proceedings under section 17 of the Married Women's Property Act, 1882, which are said to be the cross demand. By the Act of 1882, which declared that a wife was entitled to have property of her own, provision was made for deciding any question which might arise between the husband and wife as to the title or possession of property. In the administration of the Act it would appear that if either spouse establishes clear ownership of any property in dispute the court would adjudicate in favour of that spouse, but where, as so often may arise, in whole or in part there may be property in joint ownership or of uncertain origin or acquisition or the subject of alleged but disputed gifts, the court has a wider power to do what is thought just and fair. If a husband has in fact, if and when a matter of this kind is investigated by the court, a title to any property in the possession of his wife, he could prove it in the proceedings and could then obtain an order for possession in respect of it.

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[9] [1934] Ch. 431.

[10] Ibid. 442.

I would refer to *Rimmer* v. *Rimmer*[11] and *Tunstall* v. *Tunstall*,[12] to which my Lord has made direct reference, and further to *Cobb* v. *Cobb*,[13] from the judgment of Romer L.J.: "I know of no power that the court has under section 17 to vary "agreed or established titles to property. It has power to "ascertain the respective rights of husband and wife to disputed "property, and frequently has to do so on very little material; "but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by "subsequent agreement, the court cannot, in my opinion, under "section 17 vary those rights merely because it thinks that in the "light of subsequent events the original agreement was unfair."

I think it was conceded that if proceedings went as far as a decision there would have been established a demand which could be invoked as a cross demand to defeat a bankruptcy notice under the subsection in question. As I imagine, and certainly hope, that wives do not often seek to make their husbands bankrupt, the point here must rarely arise, but I can see no reason why a husband who can satisfy the court that he is likely to succeed in his proceedings and establish that his wife has in fact property of his equalling or exceeding the debt on which her bankruptcy notice has been based should not avail himself of it. Property so withheld might be the only asset with which the debtor could meet the debt by its realization if he had control of it. The proceedings by summons seem to me to be a demand by the husband for what he alleges to be his own property, and if he sets it up, as he does here, against the judgment, it becomes a cross demand. Unless he is making a demand, I do not follow the purpose of the proceedings. There are no doubt wide powers in the courts to enable them to solve such disputes, and the machinery for adjudication is special to meet the peculiar difficulties which may arise in matrimonial affairs, but the nature of the claim and the contentions to rebut it are similar to those in an action or counter-claim. If the proceedings will result in the husband as debtor having a right to property under dispute (and it was conceded that a money claim was not essential and that property of value was sufficient) at least equal to the judgment debt under the notice, it would place him in the same position as if he had a claim for a similar amount in value by ordinary action, or in the words of the subsection, by "counter-" claim or set-off." In both cases it would, in my view, be capable of avoiding a bankruptcy notice. It is necessary to see whether the husband has shown, sufficiently to satisfy the court, that he has a cross demand which equals or exceeds the amount of the judgment debt. For this purpose I think it should appear probable that he will establish a claim against his wife personally for an amount in value of at least the amount of the judgment. If a claim of right and a claim capable of being quantified in the respondent's argument means more than that, I would reject the argument. The registrar has made no finding on the probabilities of success and there can, I think, be no hard-and-fast rule as to what should or should not satisfy a court on a cross demand. The husband claims the contents of a flat and jewellery assessed by him at £20,000. The wife puts the figure at £6,000 and claims that all the property is hers as she bought some items and had the rest given to her by her husband or other persons. She does not otherwise directly refute the husband's allegation that he bought everything in dispute with his own money at a time when his wife had none of her own. Here, too, the wife is said to have removed, and under an order of the court undertaken to retain, the husband's golf clubs, library, wines, desk, safe and its contents. The judgment debt is £636 15s. 4d., and having regard to the goods involved and the respective values alleged and such evidence as there is here, including some delays of which there was some explanation, I would hold that the court should be satisfied that the husband has a cross demand which equals or exceeds the amount of the judgment debt.

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[11] [1953] 1 Q.B. 63.

[12] [1953] 1 W.L.R. 770.

[13] [1955] 1 W.L.R. 731, 736, 737; [1955] 2 All E.R. 696.

I would allow the appeal and set aside the bankruptcy notice.

Roxburgh J. On October 29, 1956, the respondent, wife of the appellant debtor, obtained judgment against him for

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£636 15s 4d., and on January 10, 1957, issued a bankruptcy notice against him. In an affidavit filed on February 19, 1957, he sought to have this notice set aside in the following circumstances. In November, 1955, that is to say, long before the judgment against him and, therefore, not by way of counter-attack, the debtor had instituted proceedings under section 17 of the Married Women's Property Act, 1882, claiming against his wife the ownership of the whole of the contents of the marital home and certain jewellery. The summons has not been placed before us, but section 17 presupposes a question between husband and wife as to the title to or possession of property, and the object of the proceedings, since the property is in the hands of the wife, must be to obtain possession of it against her. An order for possession can be made if the court thinks fit. I refer to the passage in *Tunstall* v. *Tunstall* [14] which my Lord has already cited.

This summons, in my opinion, constitutes a cross demand against her; indeed, it is the only method available to a husband for making an effective demand in such circumstances. It is true that the court appears under section 17 to have a wide discretion, considerably curtailed, however, by judicial decisions; but the circumstance that the court may not always be bound to adhere strictly to legal or equitable principles cannot in my opinion impair the effective character of the demand. It is true also that the proceedings cannot result in an order for payment of a sum of money, but it was conceded that the cross demand need not be for a sum of money. I thought, until Mr. Bagnall addressed the court, that the real question might be whether the passage in Maugham L.J.'s judgment in *In re a Bankruptcy Notice* [15] was or was not well founded. It is put by him in a somewhat tentative way, and although the passage has already been read, as it is very germane to my argument, I would take leave to read it again: "With regard to the words "'equals or exceeds the amount of the judgment debt,' I agree "with Romer L.J. that they must mean or refer to a claim "against the creditor, either for money, or, at any rate, for "money or property of value which equals or exceeds the amount "of the judgment debt. For instance, it is possible, although the "question does not arise here, if the creditor possessed a bag "of diamonds belonging to the debtor of a value exceeding the "amount of the judgment debt, this bankruptcy notice would "be set aside."

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[14] [1953] 1 W.L.R. 770, 772.

[15] [1934] Ch. 431, 441.

Now it will be observed that Maugham L.J. puts that passage in a tentative way and I, as I say, had thought that that was going to be the substantial matter upon this appeal, but I understood from Mr. Bagnall that he did not contest the accuracy of that passage as a proposition of law and for that reason I say no more about it, because it seems to me that what is true of a chattel or a piece of property must also be true of a circumscribed group or bundle of chattels.

But not every demand will suffice. A demand made in bad faith would not be good enough. The debtor must satisfy the court that he has a genuine demand. There has indeed been considerable delay in pursuing the present demand, but this aspect of the case was never canvassed before the registrar. It is not easy for anybody to compile an inventory of household effects outside his control, and I do not feel that the delay has been such as to throw doubt on the bona fides of the demand which long preceded the judgment debt.

But in my opinion a demand must be more than bona fide: the court must be satisfied that it has a reasonable probability of success. The evidence is thin on both sides, and this aspect of the case also seems not to have been considered before the registrar. My Lord has already read the material passages in the evidence and, therefore, I need not read them again before making a few short observations upon them. Taking the wife's approximate valuation of the property at £6,000, which is far below that of the husband and unlikely to be excessive, the husband's demand need only succeed to the extent of about one-tenth to be effective for the present purpose. It is true that the husband has not sworn to any details, but he has sworn that he provided the whole of the purchase money. This may well not be wholly true, but on the wife's own evidence it is not wholly false. If it is said that the husband ought to have condescended to more detail, and I think he should, so ought the wife. There is nothing in her affidavit which suggests to me that the husband's claim is unlikely to succeed to the extent necessary for the present purpose, and his evidence is just enough to satisfy me that there is a reasonable probability that it will.

Therefore, in my opinion, the requirements of section 1 (1) (*g*) of the Bankruptcy Act, 1914, have been fulfilled.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker; Lewis & Lewis and Gisborne & Co.*

J. A. G.

1957
Jan. 29, 31;
Feb. 8.

Danckwerts J.

In re WAITE'S SETTLEMENT TRUSTS.

WESTMINSTER BANK LTD. AND ANOTHER *v.* BROUARD AND OTHERS.

[1955 W. 3963.]

Conflict of Laws—Power of appointment—General power of appointment—Power contained in English settlement—General disposition in will of testatrix domiciled abroad—Whether exercise of power—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27.

Power of Appointment—General power—Nature as absolute property—Power contained in English settlement—Whether validly exercised by general disposition in will of testatrix domiciled abroad—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27.

By a deed executed in 1924, a moiety of the trust funds comprised in a settlement made in 1874 was appointed on trust to pay the income thereof to M. E. B. for life and after M. E. B.'s death in trust as M. E. B. should by deed, will or codicil appoint, and in default of and subject to such appointment in trust for M. E. B.'s daughter G. absolutely. By her will made in 1949 and therein described as her last will and testament concerning the personal estate which should belong to her at the time of her decease, M. E. B., then domiciled in Guernsey, declared that her domicile was situate there and, after legacies and certain bequests, left "the rest, residue and remainder of the portion of my personal "estate whereof I have the disposal according to law to [E.] "absolutely." In 1954 M. E. B. died domiciled in Guernsey. Her will complied in form with the requirements of the Wills Act, 1837, and with the law of Guernsey. The settlement of 1874 and the deed of 1924 were governed by English law.

Evidence was given that, by the law of Guernsey, (i) the bequest of residue was not an effective exercise of a general power of appointment, (ii) M. E. B. could dispose by will of only one half of her personal estate, and (iii) her son and her daughter were each entitled to one half of the portion of her estate of which she could not so dispose:—

Held, in deciding that by virtue of section 27 of the Wills Act, 1837,[1] the residuary bequest was an effective and complete exercise of the power of appointment:

(1) That where the instruments creating a power of appointment were governed by English law (as in this case), the question

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[1] Wills Act, 1837, s. 27: ". . . a "bequest of the personal estate of "the testator, or any bequest of per- "sonal property described in a "general manner, shall be construed "to include any personal estate, or "any personal estate to which such "description shall extend (as the case "may be), which he may have power "to appoint in any manner he may "think proper, and shall operate as "an execution of such power unless "a contrary intention shall appear "by the will."

whether the power was effectively exercised by will was also governed by English law, irrespective of the law of the testator's domicile, since a power (although general) was not a right of property; and that the law of Guernsey was accordingly irrelevant to the effectiveness of the exercise of this power.

The law is correctly stated in Halsbury's Laws of England, 3rd ed., vol. 7, p. 62, and incorrectly stated in Dicey's Conflict of Laws, 6th ed., pp. 855, 856.

(2) That the will did not indicate any "contrary intention" within the meaning of section 27.

In re Mégret [1901] 1 Ch. 547 and *In re Bald* (1897) 66 L.J.Ch. 524 followed.

In re Pryce [1911] 2 Ch. 286 questioned.

In re Lewal's Settlement Trusts [1918] 2 Ch. 391; 34 T.L.R. 538 not followed.

ADJOURNED SUMMONS.

This summons was taken out by Westminster Bank Ltd. and Alfred Joseph Peters as trustees of the will, dated December 31, 1949, of Mrs. Mary Elizabeth Blizard, who died in 1954, to determine whether the residuary bequest in her will operated as an effective exercise of a power of appointment. The power was conferred on her by a deed of appointment executed in 1924, whereby her mother, Mrs. Mary Elizabeth Waite, who died in 1926, pursuant to powers conferred by two settlements made respectively in 1874 and 1876 appointed a moiety of the trust funds comprised in the settlement of 1874 to Mrs. Blizard for life and after her death as Mrs. Blizard should appoint and in default of and subject to such appointment to Mrs. Blizard's daughter (at the date of this summons Mrs. Gwendoline Mary Farley) absolutely. By her will made in 1949 Mrs. Blizard, long domiciled in Guernsey, purported to appoint "the rest, "residue and remainder of the portion of my personal estate "whereof I have the disposal according to law to the said Elda "Brouard absolutely . . ." On February 21, 1954, she died and, on December 31, 1955, the trustees of her will took out this summons, to which the defendants were Mrs. Brouard, the residuary legatee, Mrs. Farley, who was entitled in default of appointment by Mrs. Blizard and was entitled also to a legitimate portion of Mrs. Blizard's estate under Guernsey law, and Mr. George Percy Blizard, her brother, the other person entitled to such a portion.

The summons raised the questions: 1. (i) Whether, on the true construction of Mrs. Blizard's will and having regard to her domicile being in Guernsey at the date of her death, her will operated as an effectual exercise of the general power of appointment conferred on her by the deed of 1924 with regard to (a) the whole or (b) some and what part of the moiety of the trust funds comprised in the settlement of 1874: (ii) whether the will did not operate as an effectual exercise of the power with regard to any part of that moiety; 2. Whether, according to the answers to the preceding questions and having regard to Mrs. Blizard's domicile as aforesaid, (a) Mrs. Brouard became entitled as residuary legatee under the will to the whole or any and what part of the said moiety or (b) Mrs. Farley and Mr. Blizard became entitled to any and what parts of it and to legitimate portions under the law of Guernsey or (c) Mrs. Farley became entitled in default of appointment to the whole or any and what part of the moiety.

The facts are fully stated in the considered judgment of Danckwerts J.

D. S. Chetwood (*Hector Hillaby* with him) for the trustees.

A. H. Bray for Mrs. Brouard, the residuary legatee. By virtue of section 27 of the Wills Act, 1837, the bequest in Mrs. Blizard's will of " the rest, residue and remainder of the portion " of my personal estate whereof I have the disposal according to " law . . .", which is in terms a " bequest of the personal estate " of the testator " within the meaning of the section, effectively exercises the general power of appointment conferred by Mrs. Waite's deed of 1924. The instruments creating the power of appointment, namely, the settlements of 1874 and 1876 and the deed of 1924, are governed by English law and, whether the construction of the will is or is not governed by the law of Guernsey, section 27 of the Wills Act does apply to wills made by testators domiciled in countries other than England: see *In re Baker's Settlement Trust*,[2] where the domicile was in Switzerland; *In re Simpson*,[3] where it was in France; *In re Wilkinson's Settlement*,[4] where it was in Italy, and *In re Strong*,[5] where it was in Germany.

If, by virtue of the law of Guernsey, Mrs. Blizard could not wholly and completely exercise the power (it being contended that she could and did and that that law did not prevent her), she has validly exercised it at any rate over half of the trust funds. The law of Guernsey cannot, however, affect the question whether she can exercise the power, but only (if at all) the question over what amount of property she can exercise it: see the article on "Conflict of Laws," Halsbury's Laws of England, 3rd ed., vol. 7, at p. 62; *Pouey* v. *Hordern*[6]; *In re Mégret*[7]; *In re Bald*[8]; Cheshire, Private International Law, 4th ed., pp. 538, 539; 5th ed., pp. 548, 549. The passage in Halsbury is: "If an appointment under the power is valid by English law, "no restrictions placed by the law of the testator's domicile "on the power of disposition can have any effect, the reason "being that such restrictions apply to property, and a power of "appointment is not a right of property." That passage brings out the point clearly and succinctly and is a correct statement of the law. A contrary (and, it is submitted, incorrect) statement of the law is to be found in rule 191 in Dicey's Conflict of Laws, 6th ed., p. 855, which provides: "The operation of restrictions "on the freedom of the donee to dispose by will of his movables "depends in the case of (a) a special power of appointment, on "the law which governs the operation of the instrument, and "not on the law which governs the operation of the will; (b) a "general power of appointment, on the law which governs the "operation of the will, and not on the law which governs the "operation of the instrument"; and in note 87 (to sub-rule (a)) *Pouey* v. *Hordern*[9] and *In re Pryce*[10] are cited, and in note 88 (to sub-rule (b)) *In re Pryce*[10] and *In re Lewal's Settlement Trusts*.[11] The distinction here made between general and special powers is unwarranted and the decision in *In re Lewal's Settlement Trusts*[11] ought not to be followed. [*In re Moore*,[12] *In re Hadley*[13] and *O'Grady* v. *Wilmot*[14] were also referred to.]

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[2] [1908] W.N. 161.

[3] [1916] 1 Ch. 502.

[4] [1917] 1 Ch. 620; 33 T.L.R. 267.

[5] (1925) 95 L.J.Ch. 22.

Accordingly, the court should hold that the testatrix effectively exercised the general power of appointment over the whole of one moiety of the trust funds, to which Mrs. Brouard is therefore entitled.

G. B. H. Dillon for Mrs. Farley. Section 27 does not apply in the present case; it is, indeed, expressly excluded by the testatrix herself. In stating that her domicile was in Guernsey she must have been intending to show that she at any rate thought that the law of Guernsey would govern her will (otherwise the statement would have been pointless), and that view is borne

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[6] [1900] 1 Ch. 492; 16 T.L.R. 191.

[7] [1901] 1 Ch. 547.

[8] (1897) 66 L.J.Ch. 524.

[9] [1900] 1 Ch. 492.

[10] [1911] 2 Ch. 286.

[11] [1918] 2 Ch. 391; 34 T.L.R. 538.

[12] [1901] 1 Ch. 691.

[13] [1909] 1 Ch. 20; 25 T.L.R. 44.

[14] [1916] 2 A.C. 231; 32 T.L.R. 456.

1957

WAITE'S SETTLEMENT TRUSTS, *In re.*

out by her subsequent use of the expression "whereof I have "the disposal according to law." Also, the initial expression "concerning the personal estate which shall belong to me at the "time of my decease" supports this contention. Thus, the power was not exercised at all, and Mrs. Farley is entitled in default of appointment. If the court does not accept that, then the power was exercised over not more than one half of the trust funds—that being all that the law of Guernsey allows to be disposed of by will—so that Mrs. Farley takes the other moiety.

Frank Gahan Q.C. and *J. G. Le Quesne* for Mr. Blizard. True it is that section 27 applies; not, however, so that Mrs. Farley takes in default of appointment the whole of the moiety which cannot be disposed of by will, but only half of it. The effect of its application is that what Mrs. Blizard did succeed in appointing became part of the rest of her estate; whatever part she could not dispose of by will devolved according to the law of Guernsey, one half of the moiety thus going to Mr. Blizard.

Cur. adv. vult.

February 8. DANCKWERTS J. read the following judgment. By two settlements, dated respectively September 1, 1874, and January 25, 1876 (which were in similar terms), made between Frederick Augustus Waite and Mary Elizabeth Waite, his wife, and certain trustees, trust funds and property were settled on trust (after the life interests of Mr. and Mrs. Waite and the survivor of them) for the children or remoter issue of Mr. and Mrs. Waite in such shares and with such future and executory or other trusts for the benefit of the said children and issue or some or one of them and with such provisions for their respective maintenance, education or advancement at the discretion of the trustees or of any other persons or person and on such conditions and with such restrictions as Mr. and Mrs. Waite should by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint and, in default of such joint appointment and so far as any such joint appointment should not extend, then as the survivor of them should in like manner or by will or codicil appoint.

Mr. and Mrs. Waite had three children: George Augustus Phillip Waite, Mary Elizabeth who became Mrs. Blizard, and Alice Maude who became Mrs. Tubbs. Mrs. Blizard had two children: Gwendoline Mary, who became Mrs. Farley, and a son, George Percy Blizard. Mr. Waite died on March 15, 1878, without the joint power of appointment having been exercised, and accordingly the power of appointment conferred by the settlements on the survivor became exercisable by Mrs. Waite.

By a deed poll dated August 28, 1924, Mrs. Waite appointed that the trustees for the time being of the settlements should after her death and in the meantime subject to her life interests stand possessed of one moiety or half part of all the property and investments which then were or might by any means thereafter become subject to the trusts of the settlements or either of them on the following trusts, that is to say: (i) On trust during the life of the said Mary Elizabeth Blizard to pay the income of such moiety to the said Mary Elizabeth Blizard for her separate use without power of anticipation. (ii) After the death of the said Mary Elizabeth Blizard on such trusts for such persons and purposes generally as the said Mary Elizabeth Blizard should by deed revocable or irrevocable or by will or codicil appoint. (iii) And in default of and until and subject to any such appointment in trust for the said Gwendoline Mary Blizard (Mrs. Farley) absolutely.

Mrs. Mary Elizabeth Blizard made her will dated December 31, 1949, which she described as her last will and testament concerning the personal estate which should belong to her at the time of her decease, and she declared that her domicile was in the Island of Guernsey where she had made her permanent home for many years. After giving legacies amounting to £890 and a number of other bequests, by clause 5 (21) she made the following bequest: "The rest, residue and remainder of the "portion of my personal estate whereof I have the disposal "according to law to the said Elda Brouard absolutely" with an alternative gift to take effect if Mrs. Elda Brouard predeceased her (which did not happen).

Mrs. Mary Elizabeth Blizard died on February 21, 1954, domiciled in the Island of Guernsey (a widow) and letters of administration with her will annexed were granted in England on March 19, 1955, to Westminster Bank Ltd. as attorney for Westminister Bank Executor and Trustee Company (Channel Islands) Ltd. (the executor named in the will), who had obtained probate of the will in Guernsey on February 27, 1954. As to form the will complied with the requirements of the Wills Act, 1837, as well as the law of Guernsey.

Two opinions were obtained from Mr. Charles Frossard, an advocate of the Royal Court of Guernsey, and exhibited to an affidavit by him. Mr. Frossard advised that trusts were foreign to Guernsey law and it was only in modern times that they had come into use. He also said that in his opinion there were no local laws or decided cases relating to the execution of powers of appointment. After saying that "the courts of Guernsey look "for guidance to English common law," and referring to Halsbury's Laws of England and some English cases before the Wills Act, 1837, Mr. Frossard remarked that there was not any Guernsey authority whatsoever laying down that a general power of appointment can be exercised by a residuary gift in a will. Accordingly Mr. Frossard advised that under Guernsey law in his opinion: (1) The Waite trust fund could not be dealt with as forming part of the estate of Mrs. Mary Elizabeth Blizard deceased; (2) the trust fund did not pass under the will to the residuary legatee; and (3) the gift of the residue of the personal estate of Mary Elizabeth Blizard, deceased, was not an effective exercise of a general power of appointment. In his second opinion, in answer to questions plainly directed wholly to the law of Guernsey, Mr. Frossard advised: (1) that the part of her personal estate which Mrs. Blizard could dispose of by will was one half share; (2) that the persons entitled to the portion of her estate which she could not dispose of by will were the son as to half, and the daughter as to half; and (3) he gave the reference to the relevant Guernsey law. It is perfectly clear that Mr. Frossard was advising purely on the local law of Guernsey as he makes no reference to the Wills Act, 1837, and did not consider whether it had any application to the matters on which he was asked to advise. I do not think that it occurred to Mr. Frossard's mind that the matter might be governed by English law.

In these circumstances, it was contended on behalf of Mrs. Elda Brouard that section 27 of the Wills Act, 1837, applied so as to make the residuary bequest in Mrs. Blizard's will an effective exercise of the general power of appointment, with an alternative contention that, if the law of Guernsey prevented Mrs. Blizard wholly exercising the power, at any rate it was an effective exercise of the power as to half of the trust funds.

It was contended on behalf of Mrs. Farley, as the person taking in default of appointment under Mrs. Waite's deed poll, that by reason of the terms of Mrs. Blizard's will, referring to "my personal estate whereof I have the disposal according to "law" in the residuary bequest, and the description of the will (at the beginning) as "concerning the personal estate which "shall belong to me at the time of my decease," the operation of section 27 of the Wills Act, 1837, was wholly excluded, so that the power was not exercised, and the trust funds devolved in default of appointment; alternatively it was contended that, if the Wills Act, 1837, had any application, the Guernsey law restricting testamentary disposition to one half applied, so that one half went in default of appointment. On behalf of George Percy Blizard, claiming under the law of Guernsey his legitimate share (one half of the portion which could not be disposed of by will), it was contended that section 27 of the Wills Act, 1837, applied, but so that the appointment under the residuary bequest made the appointed funds one mass with Mrs. Blizard's other estate, and the portion which Mrs. Blizard could not bequeath by will (including part of the appointed property) devolved on the persons entitled under the law of Guernsey.

The relevant provision of section 27 of the Wills Act, 1837, is as follows: ". . . and in like manner a bequest of the personal "estate of the testator, or any bequest of personal property "described in a general manner, shall be construed to include "any personal estate, or any personal estate to which such "description shall extend (as the case may be), which he may "have power to appoint in any manner he may think proper, "and shall operate as an execution of such power, unless a "contrary intention shall appear by the will."

Where, as in the present case, the documents which create the power of appointment are English instruments, it is by reason of those English instruments that the power of disposition is created, and it might be expected that English law would be held to govern the question whether there has been an effective exercise of the power of appointment. Of course, if the exercise of the power is by will, there must be a will, and it is no doubt true that the construction of a will of personal property normally depends on the law of the domicile of the deceased testator. But it is well established that section 27 applies to the will of a testator domiciled in some other country than England: *In re Baker's Settlement Trust,*[1] *In re Simpson,*[2] *In re Wilkinson's Settlement,*[3] *In re Strong.*[4]

Whether the English power of appointment has been effectively exercised by Mrs. Blizard's will is, in my view, a matter of English law, and Mr. Frossard's views on the law of Guernsey appear to me to be irrelevant on this point. The terms of the residuary bequest in Mrs. Blizard's will are clearly a "bequest "of personal property of the testator" in the words of section 27 of the Wills Act, 1837. The reference at the beginning of the will to "the personal estate which shall belong to me" and in the residuary bequest to "the portion of my personal estate "whereof I have the disposal according to law" are not in my view any indication of a contrary intention as mentioned at the end of the section.

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[1] [1908] W.N. 161.

[2] [1916] 1 Ch. 502.

[3] [1917] 1 Ch. 620; 33 T.L.R. 267.

[4] (1925) 95 L.J.Ch. 22.

The power of disposition being wholly derived from the operation of instruments regulated by the law of England, I find it difficult to see why the ability to dispose of the appointed property is not wholly regulated by the rules of English law, and I should (in the absence of authority) have supposed that the effect of section 27 of the Wills Act, 1837, was sufficient to decide the whole matter.

This seems clearly to be the view of the authors of the article on "Conflict of Laws" in Halsbury's Laws of England, 3rd ed., vol. 7, at p. 62, where it is stated: "If an appointment under "the power is valid by English law, no restrictions placed by "the law of the testator's domicile on the power of disposition "can have any effect, the reason being that such restrictions "apply to property, and a power of appointment is not a right "of property." This seems to me to be completely logical, and it is supported by the cases referred to in the note: *Pouey* v. *Hordern*[5] (a case of a special power), *In re Mégret*,[6] and *In re Bald*.[7] The same view is taken, I think, in Cheshire's Private International Law, 4th ed., at pp. 538 to 539.*

In Dicey's Conflict of Laws, 6th ed., pp. 855 to 856, a different view is put forward in the case of general powers of appointment. I find the reasoning in support of the distinction contained in the "comment" on p. 856 unrealistic, but the theory on which it rests presumably is intended to account for the results in *In re Pryce*,[8] and *In re Lewal's Settlement Trusts*.[9] In *In re Pryce*,[10] the Court of Appeal appear to have been influenced by *In re Moore*[11] and *In re Hadley*[12]; and *In re Mégret*[13] came in for some criticism. But *In re Hadley*,[14] and

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[5] [1900] 1 Ch. 492; 16 T.L.R. 191.

[6] [1901] 1 Ch. 547.

[7] (1897) 66 L.J.Ch. 524.

* 5th ed., pp. 548, 549. But see ibid., p. 546 (4th ed., p. 536), where *In re Pryce* is cited with approval.—EDITOR.

[8] [1911] 2 Ch. 286.

[9] [1918] 2 Ch. 391; 34 T.L.R. 538.

[10] [1911] 2 Ch. 286.

[11] [1901] 1 Ch. 691.

[12] [1909] 1 Ch. 20; 25 T.L.R. 44.

[13] [1901] 1 Ch. 547.

[14] [1909] 1 Ch. 20.

In re Moore,[15] were overruled by the House of Lords in *O'Grady* v. *Wilmot*[16]; and, while it is true that the last-mentioned case was mainly concerned with the incidence of estate duty, the authority of *In re Pryce*[17] has been weakened. However, whether that case be treated as an authority still binding or not, the will in that case was entirely in Dutch language and form, the testatrix appointing her husband the "sole heir of the whole "of which the law in force at the time of her death should "allow her to dispose in his favour." It does not appear to be a case in which section 27 of the Wills Act, 1837, came into the consideration of the court, and there was very positive evidence of the effect of the law of Holland on the terms of the will, restricting its effect to seven-eighths of the movables of the deceased (including movables over which a general power of appointment had been exercised). In the result, the remaining one-eighth, it was held, went to the wife's mother under the law of Holland. In my view, this case is clearly distinguishable from the present.

In re Lewal's Settlement Trusts[18] seems to me to be a very unsatisfactory case. It involved the exercise by a newly married wife, aged 19, of a general power of appointment conferred by her marriage settlement sanctioned under the Infants' Settlements Act, 1855. Her will could not operate unless French law applied so that she could by French law make a will at that age effectively only to dispose of half of her property. The settlement contained provisions obviously intended to secure that the rights of the parties should be regulated by English law, including a provision that they should be regulated by the law of England in the same manner as if the husband and wife were at the date of the settlement domiciled in England and were to remain thenceforth during their respective lives domiciled in England. If the wife had been and had remained domiciled in England she could not have made a will at the age of 19. But Petersen J. brushed aside arguments based on these provisions and decided that the will operated effectively on one half of the trust funds and the other half went in default of appointment. I find this result very difficult to understand, and, having regard to the peculiar circumstances to be found in this case, I do not think that I ought to apply it to the present case in the face of what appear to me to be the logical considerations to the contrary. It appears to me that the law is correctly stated in Halsbury's Laws of England, and Cheshire's Private International Law, in the passages to which I have referred. In my view there was an effective and complete exercise of the power of appointment in favour of Mrs. Brouard. As a result of the conclusion which I have reached, it is unnecessary for me to consider the consequences that might arise if the power of appointment was only partially exercised by Mrs. Blizard's will.

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[15] [1901] 1 Ch. 691.

[16] [1916] 2 A.C. 231; 32 T.L.R. 456.

[17] [1911] 2 Ch. 286.

[18] [1918] 2 Ch. 391.

[A declaration was made in the following form: "That on "the true construction of the will and having regard to the "testatrix being domiciled in the Island of Guernsey at the "date of her death, her said will operated as an effectual exercise "of the general power of appointment conferred on her under "the said appointment with regard to the whole of the one "moiety of the trust funds subject to the trusts of the said "settlement; and that the defendant Elda Brouard became "entitled as residuary legatee under the said will to the whole "of the said moiety."]

Declaration accordingly.

Solicitors: *Radcliffes & Co.; I. Llewelyn Jones, Ilford; Knapp-Fisher, Wartnaby & Blunt.*

K. R. A. H.

C. A.

1957
July 24, 25, 26, 29, 30.

Jenkins, Romer and Sellers L.JJ.

TIMMINS *v.* MORELAND STREET PROPERTY CO. LTD.

[1955 T. No. 1666.]

Vendor and Purchaser — Contract — Memorandum in writing — Two documents—Cheque and receipt—Cheque signed "by the party to "be charged"—Terms of agreement in receipt—Cheque payable to vendor's solicitors—Receipt subsequent in time to cheque—Agreement to sell freehold—Freehold subject to lease—No mention of leasehold in receipt — Nothing to connect cheque with receipt — Sufficiency of memorandum—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 40.

In a vendor's action for damages for repudiation of contract to buy certain freehold property under an oral agreement, dated July 20, 1955, the defendants contended, inter alia, that the documents relied on as a memorandum of the agreement did not sufficiently comply with section 40 of the Law of Property Act,

1925. The documents in question were: (1) a cheque dated July 20, 1955, for £3,900 in payment of the deposit for the purchase price, signed by a director of the defendant company on behalf of the company and drawn in favour of the plaintiff's solicitors, and (2) a receipt for the sum of £3,900, also dated July 20, 1955, describing the property as "6, 8 and 41, Boundary Street, Shoreditch (freehold)," and signed by the plaintiff (the vendor). The property was subject to a lease, but no reference appeared to it in the receipt. The defendants at the time of the contract were aware of the existence of the lease.

The grounds on which the defendants objected to the memorandum were: (1) that the omission in the receipt to state that the property was subject to a lease was an omission of a material term of the oral contract; (2) that the cheque and receipt could not be read together to constitute a memorandum for the purpose of section 40 because (a) when the cheque was signed by the defendant's agent (the party to be charged), there was no memorandum of the terms of the agreement to which it could refer, the receipt being, on the evidence, subsequent in time to the cheque, and (b) there was nothing on the face of the cheque to connect it with the receipt since it was drawn, not in favour of the plaintiff, but his solicitors:—

Held, (1) that the omission to refer to the lease did not vitiate the memorandum.

Per Jenkins L.J. The defendants, by virtue of their knowledge when they entered into the contract that the plaintiff's interest was subject to the lease, were precluded by implication of law from objecting to take the property subject to the lease whether it was or was not referred to in the memorandum.

Per Romer L.J. The sale being a sale of the freehold reversion, the lease was not a material term of the agreement; had it been a term of the agreement it should have been referred to in the memorandum.

(2) That where two documents are signed at one and the same meeting as part of the same transaction, the document signed by the party to be charged should not be treated as incapable of referring to the other document merely because the latter, on a minute investigation of the order of events at the meeting, was found to have come second in the order of preparation and signing.

(3) That it was indispensably necessary in order to justify reading two documents together that where the document signed by the party to be charged did not contain in itself all the necessary ingredients of the memorandum, it should, expressly or by necessary implication, refer to some other document in order to justify parol evidence for the purpose of the identification of that other document; and it was impossible in the present case to spell any such reference out of the cheque which was drawn, not in favour of the vendor, but of his solicitors.

Long v. *Millar* (1879) 4 C.P.D. 450, *Sheers* v. *Thimbleby* (1897) 13 T.L.R. 451 and *Stokes* v. *Whicher* [1920] 1 Ch. 411 distinguished.

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Per Romer L.J. It would be going much further than was justified by the authorities to hold that the defendants' cheque might be regarded, simply on the ground that it was a cheque and must have been drawn in reference to some transaction, as a sufficient reference to the oral agreement.

Decision of Lloyd-Jacob J. affirmed in the result.

APPEAL from Lloyd-Jacob J.

The plaintiff, Walter Henry Timmins, alleged that by an oral agreement of July 20, 1955, following negotiations between himself (acting as the sole trustee of the will of James Keeves, deceased) and the defendants, the Moreland Street Property Co. Ltd., the defendants agreed to purchase a freehold property known as 6, 8 and 41, Boundary Street, Shoreditch, for the sum of £39,000.

On the same day the defendants paid to the plaintiff a cheque for £3,900 by way of deposit for the purchase-money; the cheque was drawn on Lloyds Bank in favour of Holt, Beever & Kinsey, the plaintiff's solicitors, and was signed "For and on behalf "of the Moreland Street Property Co. Ltd. (sgd.) L. Chait, "Director." The plaintiff on receiving the cheque gave the defendants a receipt in the following terms: "Received of "Moreland Street Property Co. Ltd. the sum of £3,900 as a "deposit for the purchase of 6, 8 and 41, Boundary Street, "Shoreditch (freehold), which I agree to sell at £39,000. Dated "this 20th day of July, 1955. W. H. Timmins, Trustee of James "Keeves Trust, 25, Bloomsbury Square, W.C.1." The signature "W. H. Timmins" appeared over a sixpenny stamp.

The property was subject to a lease of 42 years dated August 14, 1950 (the terms whereof are not here relevant); this fact was not referred to in the receipt, but was known to the defendants when the deposit was paid.

On July 21, 1955, the defendants stopped payment of the cheque, and they refused to perform the agreement of July 20, 1955. The plaintiff by this action: (1) asked for a declaration that the defendant company had repudiated the agreement, and (2) claimed damages for breach of the agreement.

The defendants admitted that they had paid the cheque on July 20, 1955, and stopped payment of it on July 21, 1955, but contended that they were entitled to do so. They relied on a number of defences, but the only issue which calls for report was whether the cheque and receipt constituted a sufficient memorandum for the purpose of section 40 of the Law of Property Act, 1925.[1]

On April 17, 1957, Lloyd-Jacob J. held that the two documents did not constitute a sufficient memorandum on the ground that they contained no reference to the lease. The plaintiff appealed. The defendants cross-appealed.

P. Ingress Bell Q.C. and *Dr. W. G. H. Cook* for the plaintiff. It is not necessary, in order to comply with section 40 of the Law of Property Act, 1925, that a memorandum should set out the terms of the property to be sold or the incumbrances and leases. If the purchaser before the date of the contract does not know of the incumbrances and tenancies, he can avoid the contract if the property is later found to be subject to such incumbrances, as there is an implied obligation on the part of the vendor to convey the fee simple free from incumbrances. That, however, is a matter of title, and it is not a case for pleading section 40. If, however, the purchaser knows that there are irremovable incumbrances and that the vendor has not the unincumbered fee simple, the implied obligation to convey the fee simple free from incumbrances is rebutted and the purchaser must take the property as it is. It is not the function of a memorandum under section 40 to state what are the implied obligations or the existence of circumstances rebutting those obligations.

The question whether property is subject to a lease—which naturally means that the purchaser does not have vacant possession—is a matter of title. One must distinguish between contracts in writing and questions of title. Where it is actually stated in a contract that there is a good title, the vendor cannot be permitted to contradict that statement, but that is not so in the case of a memorandum under section 40: see Halsbury's Laws of England, 2nd ed., vol. 29, p. 256. A memorandum has only to contain the parties, the price and the property, and any special terms agreed; the details of the vendor's actual interest need not be stated in it: see Halsbury, vol. 29, pp. 241–242; Fry on Specific Performance, 6th ed., p. 173; Dart on Vendor and Purchaser, 7th ed., p. 240; 8th ed., p. 220. It is not necessary in the memorandum to state the interest of the vendor or to set out

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[1] Law of Property Act, 1925, s. 40: "(1) No action may be brought "upon any contract for the sale . . . "of land or any interest in land, un- "less the agreement upon which such "action is brought, or some memo- "randum or note thereof, is in "writing, and signed by the party "to be charged . . ."

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anything which is not essential to give effect to the bargain: *Cox* v. *Middleton*[2]; *Ogilvie* v. *Foljombe.*[3]

[ROMER L.J. Suppose the property was sold subject to a rentcharge, and the memorandum does not show it, you say that that does not matter?]

It does not matter if the purchaser knew of it; in that case he could not object. It could be an objection to title but not to the contract: see Emmet on Title, 14th ed., vol. 1, p. 52, and Halsbury, vol. 29, p. 256. The right to a good title is not a matter of stipulation in the contract; it is implied as the general right of a purchaser, but that right is rebutted if it is shown that the purchaser knew that a good title did not exist: *McGrory* v. *Alderdale Estate Co. Ltd.*[4] and *Gray* v. *Smith.*[5] An agreement to sell land not expressing what interest is sold must be construed as importing the whole of the vendor's interest in the land: *Bower* v. *Cooper.*[6] Here the agreement was to sell the plaintiff's freehold reversion, and it is properly described in the memorandum as "freehold."

A memorandum is insufficient where it omits a material term of the contract: *Hawkins* v. *Price*[7]; *Johnson* v. *Humphrey.*[8] No material term not known to the defendants is omitted here from the memorandum.

The cheque, which is signed by the party to be charged, can be read together with the receipt to constitute a sufficient memorandum for the purpose of section 40: *Burgess* v. *Cox.*[9]

The definition of "land" in section 205 of the Law of Property Act "includes land of any tenure." Although section 40 refers to any interest in land so as to catch up a share of land or part of a plot of land, it is not meant to catch an interest like this lease, which is in the nature of an incumbrance. There is nothing in the textbooks which would suggest that an incumbrance should be mentioned in the memorandum. It was wholly unnecessary to refer to the lease; the plaintiff was selling the whole of his interest, which was the freehold reversion subject to the lease; the memorandum has only to identify the property sold; it does not have to specify the vendor's interest in that property.

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[2] (1854) 2 Drew. 209.

[3] (1817) 3 Mer. 53.

[4] [1918] A.C. 503.

[5] (1889) 43 Ch.D. 208; 6 T.L.R. 109.

[6] (1843) 2 Hare 408.

[7] [1947] Ch. 645; [1947] 1 All E.R. 689.

[8] [1946] 1 All E.R. 460.

[9] [1951] Ch. 383; [1951] 1 T.L.R. 531; [1950] 2 All E.R. 1212.

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C. R. D. Richmount for the defendants. The question is whether or not there was a sufficient memorandum for the purpose of section 40 of the Law of Property Act; it is not a claim for specific performance. Assuming, without admitting, that the cheque and the receipt together constitute a memorandum, nevertheless such memorandum is insufficient because the oral agreement was that the property should be sold subject to and with the benefit of the lease. It was an essential part of the bargain that the property was being sold subject to and with the benefit of the lease, but looking at the receipt, which describes the property as being freehold and is silent with regard to the lease, it cannot be said that it records the bargain agreed upon: Megarry and Wade's Law of Real Property, p. 516; *Rishton* v. *Whatmore.*[10] The lease, subject to which this property was sold, had the effect of postponing possession for 42 years; such an essential part of the bargain should have appeared on the memorandum; failure to refer to it must vitiate the memorandum: *Hawkins* v. *Price*[11]; *Beckett* v. *Nurse.*[12] The defendants have pleaded section 40 and the onus is on the plaintiff to show that the section was sufficiently complied with.

[SELLERS L.J. The defendants knew that there was a lease.]

Questions as to a person's knowledge are not relevant; the question is whether there is a satisfactory description for the purpose of section 40. The whole object of the section is that the person who is "to be charged" shall be faced with a document in writing containing all the material terms of the bargain. There is a vast difference between a memorandum and a contract.

The defendants by their cross-appeal challenge the finding of the judge that the cheque and receipt can be read together so as to constitute a sufficient memorandum in writing. The cheque, which was signed by the defendants' agent, cannot be held to refer to the receipt, as the latter was not in existence at the time when the cheque was signed. Where a memorandum consists of two documents, the document signed by the party to be charged must refer to a document already in existence: *Turnley* v. *Hartley*[13]; Megarry and Wade, p. 514. There appears to be no case where a cheque, which was signed by the party to be charged but came into existence before the receipt containing the rest of memorandum, has been held to constitute a sufficient memorandum in writing. Next, in order that a signed document can be linked with another document, it must refer to that other document, which must be in existence when the first document was signed: *Peirce* v. *Corf* [14]; *Long* v. *Millar.*[15] Unless one can find a reference express or by necessary implication from one document to the other, the two documents cannot be read together: *Stokes* v. *Whicher.*[16] The case of *Sheers* v. *Thimbleby* [17] was totally different; both documents there obviously referred to the same transaction without the aid of parol evidence. Here the only two things which link up are the references to the sum of £39,000 and the name of the defendant company. To connect the documents it would be necessary to go to the correspondence.

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[10] (1878) 8 Ch.D. 467.

[11] [1947] Ch. 645.

[12] [1948] 1 K.B. 535; 64 T.L.R. 95; [1948] 1 All E.R. 81.

[13] (1848) 3 New Pr.Cas. 96.

In *Long* v. *Millar* [18] the court considered what evidence could be admitted in order to connect the two documents, and it was held that there must be some reference on the face of the document signed by the party to be charged which would lead one to the other document. In *Burgess* v. *Cox* [19] it could be seen merely by placing the two documents side by side that they referred to the same transaction. It is not permissible to use oral evidence in order to connect the two documents.

The cheque in this case was addressed to a firm of solicitors; it is known that those solicitors were employed by the plaintiff, and that the plaintiff was the vendor; but it cannot be said merely by looking at the cheque, which does not contain the name of the vendor, that the same necessarily refers to this transaction. There is no reason why this cheque drawn in favour of Holt, Beever & Kinsey should relate to the transaction referred to in this receipt signed by a person called Timmins: see *Peirce* v. *Corf* [20]; *Long* v. *Millar,*[21] *per* Baggallay J.

Ingress Bell Q.C. in reply. What was said some 50 or 60 years ago about joining two documents together is no longer true. It is now settled that even if there is no direct reference in one document to another, their connexion may be explained by parol evidence: *Burgess* v. *Cox.*[22] Only the absence of the signature of the defendant company prevents the receipt from constituting a valid memorandum. The receipt leads the court to inquire into the circumstances for which it was drawn up, and that leads one to the cheque. If one document puts one on an inquiry which leads directly to a second document, and the two documents together constitute a sufficient memorandum, then it is immaterial that one document could have referred to some other transaction. The cheque itself is a document which by its nature must refer to some transaction, since it is presumed to have been given for value, and the court is entitled to inquire into the nature of that transaction. Any such inquiry is bound to lead to the contract of sale, all the remaining terms of which are to be found in the receipt, which can then be read together with the cheque which is signed by the party to be charged.

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[14] (1874) L.R. 9 Q.B. 210.
[15] (1879) 4 C.P.D. 450.
[16] [1920] 1 Ch. 411, 418.
[17] (1897) 13 T.L.R. 451.
[18] 4 C.P.D. 450.
[19] [1951] 1 Ch. 383.
[20] L.R. 9 Q.B. 210.
[21] 4 C.P.D. 450, 455.
[22] [1951] 1 Ch. 383.

No emphasis ever appears to have been put on the order in which two connecting documents came into existence. In *Pearce* v. *Gardner* [23] an envelope was used to supply the name of one of the parties to a contract, and was held with the letter it contained to constitute a sufficient memorandum; if the envelope was written later, that fact does not appear to have disturbed the court. [*Burgess* v. *Cox*,[24] *Stokes* v. *Whicher* [25] and *Oliver* v. *Hunting* [26] were also referred to.]

JENKINS L.J., having stated the facts and considered the issues not relevant to this report, continued: I must now pass to the defence based on the absence of any sufficient memorandum in writing signed by the defendants to satisfy section 40 of the Law of Property Act, 1925. As to this defence Mr. Bell, for the plaintiff, contended that the cheque dated July 20, 1955, signed by Chait on behalf of the defendants in favour of Holt, Beever & Kinsey for the sum of £3,900, which was in fact the amount of the deposit orally agreed upon, and the receipt of the same date for a like amount signed by the plaintiff, whereby he acknowledged that he had received from the defendants £3,900 deposit on the sale of the property in question, which he agreed to sell for £39,000, could and should be read together, and so read constituted a sufficient memorandum containing all the essential terms of the oral agreement entered into.

Mr. Richmount, on grounds to which I will later refer, contended for the defendants that the cheque and receipt could not be read together so as to constitute between them for the purposes of section 40 a memorandum in writing of the oral contract signed by the defendants or their duly authorized agent, Chait.

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[23] [1897] 1 Q.B. 688.

[24] [1951] Ch. 383.

[25] [1920] 1 Ch. 411.

[26] (1890) 44 Ch.D. 205.

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Even if, contrary to his contention, the cheque and receipt could be read together, Mr. Richmount contended that the memorandum so constituted would be insufficient because the receipt described the property agreed to be sold as "6, 8 and "41, Boundary Street, Shoreditch (freehold)," omitting to state that the plaintiff's freehold interest was subject to the lease of August 14, 1950. It was, said Mr. Richmount, an essential term of the oral contract that the defendants were to take the property subject to the lease, and the memorandum relied on by the plaintiff, even if good in other respects, was vitiated by its omission of this essential term.

The judge accepted Mr. Bell's submission that the cheque and the receipt could be read together so as to constitute a memorandum for the purposes of section 40, but, on the other hand, acceded to Mr. Richmount's objection that, even so, the memorandum thus constituted was insufficient, because it did not state that the plaintiff's freehold interest was subject to the lease.

On the assumption that the cheque and receipt can be read together, I think this objection is ill-founded. Mr. Richmount argued, in effect, that this was a case of the omission from the memorandum of a term of the oral agreement which, if the omitted term is a matter of any substance, may vitiate the memorandum, as in *Johnson* v. *Humphrey* [1] and *Hawkins* v. *Price*.[2]

I cannot accept this view. The question here is whether the memorandum relied upon by the plaintiff sufficiently described the subject-matter of the contract, or, in other words, that which was orally agreed to be sold, which was in fact the freehold reversion subject to the lease. The physical description of the property sold as "6, 8 and 41, Boundary Street, Shoreditch," is perfectly accurate, and so is the addition of the bracketed word "(freehold)." A description of this kind is to be taken as extending to the whole of the vendor's interest in the property, so that the memorandum on the face of it records an agreement for the sale and purchase of the whole of such interest. Moreover, unless the contrary appears, such interest is to be taken as comprising the fee simple in possession free from incumbrances, and the purchaser will be entitled to reject any less interest than that. But if it is shown that at the time when the oral contract was entered into the purchaser knew that the

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[1] [1946] 1 All E.R. 460.

[2] [1947] Ch. 645; [1947] 1 All E.R. 689.

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interest actually possessed and offered for sale by the vendor was subject to some irremovable incumbrance, such as a lease, then the presumption that the interest agreed to be sold by the vendor is the fee simple in possession free from incumbrances will, quoad that incumbrance, be rebutted, and the purchaser will be bound to accept a conveyance subject to that incumbrance as a sufficient performance of the contract.

It appears to me, therefore, that the description in the receipt in the present case of the property agreed to be sold as "6, 8 and 41, Boundary Street, Shoreditch (freehold)," is not vitiated for the purposes of section 40 by its omission to state that the property was sold subject to the lease.

On the principle I have stated it is abundantly plain, in the circumstances of the present case, that the defendants could not object to taking the property subject to the lease. Even if they could have so objected, then the position would have been that the plaintiff had entered into a contract which he was unable to perform, and not that the terms of the contract were insufficiently stated in the memorandum.

In a word, on the assumption that the memorandum relied on was sufficient in other respects, I think that by virtue of their knowledge at the time of entering into the oral contract that the plaintiff's interest was subject to the lease, the defendants were precluded by implication of law from objecting to take the property subject to the lease, whether it was or was not described in the memorandum as being so subject.

Mr. Richmount's submission would make it very difficult to find an adequate memorandum in the case of a large estate of perhaps several thousand acres which might be subject as to different parts of it to numerous tenancies and other incumbrances. If Mr. Richmount's submission is accepted, a memorandum recording an informal oral agreement for the sale of a large estate of that kind would nearly always be defective because it had failed to set out all the incumbrances affecting the property.

One may suggest, too, the case of a property held on a long lease. The owner of such a property, in negotiating its sale without the aid of a solicitor, might very well show the prospective purchaser the lease and say "This is the document under "which I hold. I will sell the property to you for the whole of "my interest under it." Then if the parties thought it advisable to put the transaction into writing and they did it themselves, and the vendor in consequence signed a memorandum referring simply to "My house Blackacre," without any reference to tenure, it would, as I think, be a most inconvenient and unfair result, given, of course, the essential element of knowledge on the part of the purchaser that the vendor's interest was leasehold only, that such a memorandum should be held to be insufficient.

Accordingly, I think that the omission of any reference to the lease in the receipt was immaterial, and that this branch of Mr. Richmount's argument fails.

A number of authorities were referred to on or about this point. I may perhaps quote briefly from the following as affording some support for my conclusion. In Dart on Vendors and Purchasers, 7th ed., vol. 1, p. 240, one finds this: "It is "immaterial that the agreement does not distinguish the tenures "of the several portions of the estate; or even the tenure of the "whole estate, if this can be shown to have been in the knowledge of both parties." Then lower on the same page: "On "a contract for the sale of land the precise interest to be sold "need not appear in the memorandum. Unless the contrary "appears, such contracts are always assumed to be for the sale "of the whole of the vendor's interest and, as against the vendor, "for the sale of the fee simple free from incumbrances. Hence, "where the nature of the interest to be sold does not appear "from the contract, the vendor cannot force the purchaser to "accept, nor the purchaser force the vendor to grant, any less "estate than the fee simple. But an agreement by a vendor to "sell 'all his estate and interest' does not necessarily imply "that the interest to be sold is the fee simple."

Then in Fry on Specific Performance, 6th ed., p. 173, one finds this: "A contract to sell a house simply implies that the "interest sold is the fee simple . . ."

Then there is *Bower* v. *Cooper*,[3] in which specific performance of a contract was resisted on the ground, amongst others, that the interest intended to be sold did not sufficiently appear. Wigram V.-C. held[4]: "The agreement must be construed as "referring to and importing the whole of the defendant's interest "in the premises . . ."

Then there is *Cox* v. *Middleton*,[5] where one finds this by Kindersley V.-C.[6]: "Now I ought, it is said, to read it as if the "words 'Mr. Cox paying the expenses of the lease' were left "out. If the contract stood so, there could be no difficulty or "doubt about it, because, if the parties contract together for

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[3] (1843) 2 Hare 408.
[4] Ibid. 410.
[5] (1854) 2 Drew. 209.
[6] Ibid. 216.

"the purchase of a house, prima facie the contract is to purchase "the fee simple. It may be that the party purchasing may "know that the vendor had not the fee simple, and then such "a contract might be performed by the purchaser having all the "interest of the vendor."

Then there is *In re Gloag and Miller's Contract*,[7] where Fry J. said[8]: "In my view the law as to the first question stands in "this way: When the contract is silent as to the title which is "to be shown by the vendor, and the purchaser's right to a good "title is merely implied by law, that legal implication may be "rebutted by showing that the purchaser had notice before the "contract that the vendor could not give a good title."

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Then there is *Ellis* v. *Rogers*,[9] in which Kay J. said[10]: "The law, as stated in the cases of *Cato* v. *Thompson*[11] and "*In re Gloag and Miller's Contract*,[12] is that where the contract "does not expressly provide that there should be a good title, "the knowledge of the purchaser before the contract that there "was a defect which the vendor was unable to remove, prevents "his raising an objection on that ground. But it is essential "that the purchaser should have knowledge, not only of the "existence of the incumbrance, but of the vendor's inability to "remove it."

Finally on this part of the case I think some assistance is to be derived from *McGrory* v. *Alderdale Estate Co. Ltd.*[13] The decision there was to the effect that when a specific performance action had reached the stage of inquiry as to title, it was too late for the vendor to say that the purchaser was precluded on the ground of knowledge from taking some particular objection. Mr. Maugham, for the appellant, stated in argument these propositions[14]: "1. It is an implied term of an open contract "for the sale of land that the vendor shall show a good title "free from incumbrances; this is a legal as well as an equitable "doctrine. 2. Evidence may be admitted in such a case, not-"withstanding the Statute of Frauds, to identify the parcels "and the nature of, and qualifications attaching to, the title as "forming part of the facts which both parties had in their "minds. 3. Where evidence can be adduced to limit or qualify "the title to be shown it must be adduced at the trial, in order "to determine whether there is a complete contract or a contract

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[7] (1883) 23 Ch.D. 320.

[8] Ibid. 327.

[9] (1885) 29 Ch.D. 661.

[10] Ibid. 666.

[11] (1882) 9 Q.B.D. 616.

[12] 23 Ch.D. 320.

[13] [1918] A.C. 503.

[14] Ibid. 504.

"which will be specifically performed." Then Lord Finlay said [15]: "The law is clear that, if there is a written agreement "of sale which expressly provides that a good title is to be made, "it is not open to the vendor to prove that at the time of the "contract the purchaser knew of a defect in the title for the "purpose of leading to the inference that a good title was not "to be shown in that particular. This would be to vary a "written contract by parol evidence. But, if the contract is "open, the obligation which the law would import into it to "make a good title in every respect may be rebutted by proving "that the purchaser entered into the contract with knowledge "of certain defects in the title. The inference in such a case "is that he was content to take a title less complete than that "which the law would otherwise have given him by implication. "In a case of this kind it seems to me to be clear on principle "that if the vendor means to rely on such knowledge by the "purchaser at the time of the contract he must establish this "at the hearing."

Mr. Richmount further argued that the cheque and receipt could not be read together for the purpose of providing a memorandum to satisfy section 40. He put this part of the case on two grounds, neither of which was dealt with by the judge, who contented himself by stating that, in his judgment, the cheque and receipt could be read together, without giving any reasons for that opinion.

The first of Mr. Richmount's arguments on this point was based on the plaintiff's evidence as to the order in which the two documents were signed. From that evidence it appears that Chait signed the defendants' cheque in favour of Holt, Beever & Kinsey in blank and handed it to the plaintiff, telling him to "fill it in for the deposit," which the plaintiff accordingly did. The plaintiff then drafted a receipt, took it down to his secretary, and asked her to type it out. The secretary brought back the typed version, which the plaintiff then signed and handed to Chait. On these facts, says Mr. Richmount, the receipt relied on as part of the memorandum was not in existence at the time when the cheque relied on as the other part of the memorandum—the vital part bearing the signature of the agent of the party to be charged—was signed by Chait; and a document signed by the party to be charged cannot be treated as referring to a document not in existence at the time when it was signed for the purpose of constructing a memorandum to satisfy section 40.

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[15] [1918] A.C. 503, 508.

In support of this contention Mr. Richmount referred us to *Turnley* v. *Hartley*.[16] I think the facts appear sufficiently from the headnote[16]: "At a sale by auction, the auctioneer signed "the defendant's name upon a bill containing 'particulars of "'sale,' as a purchaser of one of the lots. About one hour "after, the plaintiff signed his name as vendor to a printed list "of conditions, referred to in the particulars of sale. The name "of the vendor appeared in no other part of the particulars or "conditions:—*Held*, that there was no sufficient note in writing "under the Statute of Frauds to charge the defendant."

The judgments are extremely short, and they are these: Lord Denman C.J.[17]: "The nonsuit was perfectly right. It "would be at once to repeal the statute, to hold that here it "has been complied with." Coleridge J.[17]: "When the defen-"dant's agent signed the particulars, he signed something which "did not bind him. It was no complete memorandum of a "bargain, the name of one of the parties being wanting. If the "vendor had signed the moment afterwards, so that it was "clearly part of one transaction, it might have been sufficient; "but that is not the case here." Wightman J.[17]: "To fulfil "the requirements of the statute, the memorandum must be "such that, at the time of the signature it contains a valid "contract. It will not do to complete the contract by the intro-"duction of something afterwards. Here, at the time the "defendant signed the memorandum, there was no valid "contract." Erle J.[17]: "The note in writing, to be valid, must "contain all the essentials of the contract, and the name of the "vendor is one of the essentials."

This point has caused me some difficulty, but I am, on the whole, of opinion that where two documents relied on as a memorandum are signed and exchanged at one and the same meeting as part of the same transaction, so that they may fairly be said to have been to all intents and purposes contemporaneously signed, the document signed by the party to be charged should not be treated as incapable of referring to the other document merely because the latter, on a minute investigation of the order of events at the meeting, is found to have come second in the order of preparation and signing. I think this

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[16] (1848) 3 New Pr.Cas. 96.

[17] Ibid. 97.

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view is supported by the judgment of Coleridge J. in *Turnley* v. *Hartley*.[18] Accordingly, I would reject this argument.

Mr. Richmount's third contention on this part of the case is more formidable. It is to the effect that the cheque, which is on the face of it nothing more than an order on the defendants' bankers to pay Holt, Beever & Kinsey the sum of £3,900, contains no reference, express or implied, to any other document or transaction, and therefore cannot, on the authorities, be connected with the aid of oral evidence to the receipt for the purpose of constructing a memorandum to satisfy the section.

On this part of the case Mr. Richmount referred us to *Peirce* v. *Corf*.[19] Quain J. said this[20]: "The first question that Mr. "Herschell raised is that the catalogue, which contained the "conditions, and the sales ledger, which contained the price and "the name of the purchaser, are sufficiently connected, so as to "be considered as a memorandum in writing within the Statute "of Frauds. I think they do not constitute a contract within "the Statute of Frauds, because I cannot see on the face of "them anything to connect the one with the other, so as to "enable me to read them together. I take the principle to be "well laid down in *Dobell* v. *Hutchinson*,[21] where it is said by "Lord Denman C.J.: 'Upon examination it will be found that "'the cases establish this principle, that where a contract in "'writing or note exists which binds one party, any subsequent "'note in writing signed by the other is sufficient to bind him, "'provided it either contains in itself the terms of the contract, "'or refers to any writing which contains them.' Therefore on "the document itself there must be some reference from the "one to the other, leaving nothing to be supplied by parol "evidence."

Then Archibald J. said[22]: "I am of the same opinion, and I "think the judgment of the county court judge was right. As "regards the first point, whether there is a contract within the "Statute of Frauds, apart from the letter of March 28, I think "it is quite clear there must be, to satisfy the statute, either a "written contract complete in itself, or a contract in writing on "different papers, referring to each other in such a manner as "to show they are parts of the same contract. No doubt the "reference may be made in various ways, but it must be of such "a nature as to make it clear that the one does refer to the

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[18] 3 New Pr.Cas. 96.

[19] (1874) L.R. 9 Q.B. 210.

[20] Ibid. 217.

[21] (1835) 3 Ad. & E. 355, 371.

[22] L.R. 9 Q.B. 218.

"other; and on that point there seems to me to be a failure here "to connect these two documents together. It is impossible "to do it except by the intervention of parol evidence. That "would be going beyond any purpose for which parol evidence is "admissible, which is merely to explain a latent ambiguity, "and therefore there is no sufficient connexion between the "papers to constitute a contract within the Statute of Frauds."

Peirce v. *Corf*[23] was followed in *Rishton* v. *Whatmore*.[24] These cases took, I think, a stricter view of what was necessary to constitute a reference to another document for the present purpose, and of the limits within which parol evidence was admissible to connect them, than is commonly held today.

A more liberal principle was applied in *Long* v. *Millar*.[25] In that case the purchaser (Long) orally agreed with the vendor (Millar) to buy three plots of land in Rickford Street, Hammersmith, for £310 and to pay £31 deposit. Long on September 21, 1877, duly paid the deposit and signed a memorandum containing all the essential terms of the bargain other than the vendor's name. On the same day Millar signed a receipt in these terms: "Received of Mr. George Long the sum of £31 as a deposit on "the purchase of three plots of land at Hammersmith."

Long sued Millar for breach of the contract, and the material question was whether the two documents to which I have referred could be combined to form a sufficient memorandum to satisfy section 4 of the Statute of Frauds. The Court of Appeal held that the two documents could be so combined.

Bramwell L.J. said[26]: "But the point to be established by "the plaintiff is that the defendant has bound himself, and a "receipt was put in evidence signed by him, and containing the "name of the plaintiff, the amount of the deposit, and some "description of the land sold. The receipt uses also the word "'purchase,' which must mean an agreement to purchase, and "it becomes apparent that the agreement alluded to is the "agreement signed by the plaintiff, so soon as the two documents "are placed side by side. The agreement referred to may be "identified by parol evidence."

Baggallay J. said[27]: "I agree that, subject to the question "of the omission of the vendor's name, the document signed "by the plaintiff would be sufficient to charge him. Out of "these materials can a valid memorandum in writing be framed?

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[23] L.R. 9 Q.B. 210.

[24] (1878) 8 Ch.D. 467.

[25] (1879) 4 C.P.D. 450.

[26] Ibid. 454.

[27] Ibid. 455.

"I think it can. The true principle is that there must exist "a writing to which the document signed by the party to be "charged can refer, but that this writing may be identified by "verbal evidence. I think that in the present case by the words "'purchase of three plots of land' the receipt sufficiently refers "to the document signed by the plaintiff: Therefore the con-"tract seems to me to be complete."

Thesiger L.J. said [28]: "The first question is whether there is "a sufficient reference in the receipt signed by the defendant to "allow us to connect it with the document signed by the plaintiff. "When it is proposed to prove the existence of a contract by "several documents, it must appear upon the face of the instru-"ment signed by the party to be charged that reference is made "to another document; and this omission cannot be supplied "by verbal evidence. If, however, it appears from the instru-"ment itself that another document is referred to, that document "may be identified by verbal evidence. A simple illustration "of this rule is given in *Ridgway* v. *Wharton* [29]; there 'instruc-"'tions' were referred to; now instructions may be either "written or verbal; but it was held that parol evidence might "be adduced to show that certain instructions in writing were "intended. This rule of interpretation is merely a particular "application of the doctrine as to latent ambiguity. Although "parol evidence may be given to identify the document intended "to be referred to, it must be clear that the words of the docu-"ment signed by the party to be charged will extend to the "document sought to be identified."

Later on he said [30]: "This document is somewhat informal, "and does not contain such language as we should expect a "lawyer to use; nevertheless, it contains all the terms necessary "to create a valid contract except the name of the vendor; and "the receipt contains the word 'purchase,' which must refer "to the purchase of the plots of land mentioned in the document "signed by the plaintiff; if we read the two instruments "together, we shall not be unduly straining the law by holding "that the two, taken together, form a complete contract . . ."

In *Stokes* v. *Whicher* [31] Russell J. summarized the effect of *Long* v. *Millar* [32] in this way [33]: "*Long* v. *Millar* [34] comes to "this: that, if you can spell out of the document a reference in

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[28] 4 C.P.D. 450, 455, 456.
[29] (1857) 6 H.L.C. 238.
[30] 4 C.P.D. 456.
[31] [1920] 1 Ch. 411.
[32] 4 C.P.D. 450.
[33] [1920] 1 Ch. 418.
[34] 4 C.P.D. 450.

"it to some other transaction, you are at liberty to give evidence "as to what that other transaction is, and, if that other trans-"action contains all the terms in writing, then you get a suffi-"cient memorandum within the statute by reading the two "together."

In the same case Russell J. found it possible to supply the omission of the purchaser's name from the document signed by the party to be charged (who was the vendor) by connecting a cheque signed by the plaintiff in favour of the vendor with a receipt for the deposit written on the document signed by the vendor and likewise signed by him.

Russell J. also in the same case considered, but did not adopt, an argument put forward by Mr. Clauson, the judge's observations upon it being the following[35]: "Mr. Clauson has "put his case upon a higher platform and said that, even if you "do not get any reference, either inferential or otherwise, in the "second, the defective, document to the first, the authorities go "to show that if, placing the two documents side by side, there "is, upon an inspection of them, such a physical state of affairs "that it is obvious that they were produced at the same time "and that they originally, to that extent, formed a single docu-"ment, you can take them and read them together, even though "one document does not by inference or in terms contain a "reference to the other. There is some colour for that proposi-"tion in *Oliver* v. *Hunting*[36] before Kekewich J., and more "still in the later case before the Court of Appeal of *Sheers* v. "*Thimbleby*.[37] However that may be, I do not propose to "decide this case upon that broad ground, because I have come "to the conclusion that, upon this document as it stands, I "can find in it a sufficient reference to another document which "contains the necessary terms."

It should be observed that the two documents under consideration in that case were in fact a top copy and carbon. That appears from Mr. Clauson's argument. He said[38]: "If there "exist two documents and, putting them together side by side, "it is clear there is some connexion between them, that admits "parol evidence as to the circumstances under which they came "into existence. Here there is the typewritten original and "the exact counterpart or duplicate in the carbon copy, and it "would, as A. L. Smith L.J. said in *Sheers* v. *Thimbleby*,[39] be

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[35] [1920] 1 Ch. 419.
[36] (1890) 44 Ch.D. 205.
[37] (1897) 13 T.L.R. 451.
[38] [1920] 1 Ch. 415.
[39] 13 T.L.R. 452.

" 'sheer affectation' to pretend they are not connected: *Long* " v. *Millar*."[40] Mr. Clauson seems to have placed some reliance on the special circumstance in that case that the two documents were a top copy and carbon and, therefore, manifestly, when put side by side, documents which were brought into existence at the same moment.

As to *Sheers* v. *Thimbleby*,[41] the two documents which it was held could be read together were both signed by the party to be charged, but the earlier one had to be combined with the later one (they were dated on successive days) in order to provide a sufficient memorandum in writing of the guarantee sued upon. Both documents contained what were obviously references to the same transaction.

A. L. Smith L.J. said[42]: "The question which does arise is, " can the whole promise be found in a memorandum in writing? " If I were confined to the letter of September 15, 1879, I should " have thought that it could not; but the determination of this " case does not, in my judgment, depend upon the letter of " September 15, 1879, alone, for the two documents of " September 15 and 16, 1879, appear to me, when placed side " by side, to be so connected with each other and without the " aid of parol evidence that both may be considered together " when ascertaining what is the contract, and whether there is " a sufficient memorandum within the meaning of the Statute of " Frauds. The case which best exemplifies this point is that " of *Long* v. *Millar*,[43] in which the court held that a contract is " valid within the fourth section of the Statute of Frauds where " documents exist which can be connected together without the " aid of verbal evidence."

Then after setting out the circumstances of *Long* v. *Millar*,[43] the Lord Justice continued[44]: "This court held that by the " word 'purchase' used in each document the two were so " connected together that they could be looked at, for when " placed side by side the one obviously referred to the other, " and thus a valid memorandum existed within the fourth " section of the statute." Then he went on to say[44]: "Now, " in the present case, so soon as the two documents of September " 15 and 16, 1879, are placed side by side, to my mind it at once " becomes apparent that they are connected together, and that

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[40] 4 C.P.D. 450.
[41] 13 T.L.R. 451.
[42] Ibid. 452.
[43] 4 C.P.D. 450.
[44] 13 T.L.R. 452.

"this, as in the case of *Long* v. *Millar*,[45] appears without the "aid of parol evidence."

Later in his judgment he said[46]: "So here it would, in my "judgment, be sheer affectation to say that without the aid of "parol evidence it cannot be predicated whether Burton's and "Balderson's investments in the letter of September 15 referred "to Burton's and Balderson's mortgages in the document of "September 16, for in my opinion they clearly do, and formed "part of one and the same transaction. It does not seem to "me that the fact of the two documents having been written, "one on one day and the other on the next, causes them to be "such separate and distinct documents that the one cannot be "connected with the other without the aid of parol evidence, "for in my judgment it is not so."

Chitty L.J. in the same case said[47]: "In the present case "I think that the letter, when read in the light of the evidence "of the surrounding circumstances, shows with a sufficient degree "of certainty what investments were referred to, and that it is "immaterial whether the investments were made on September "15 or the following day. The guarantee applied to the invest-"ments already agreed to, whether actually made or not."

In *Burgess* v. *Cox*[48] Harman J. held, following *Sheers* v. *Thimbleby*,[49] that a letter from a purchaser to a vendor referring to the purchase of a certain holiday camp could be read with an earlier document stating terms for the sale of the same camp and signed by the vendor only, so as to constitute a memorandum for the purposes of section 40, on the ground that the two documents, when placed side by side, manifestly referred to the same transaction.

It is said that in the present case the cheque for £3,900 drawn by Chait on behalf of the defendants in favour of Holt, Beever & Kinsey on July 20, 1955, and the receipt of the same date signed by the plaintiff, whereby he acknowledged that he had received of the defendants the sum of £3,900 as a deposit for the purchase of the Boundary Street property, when laid side by side, are so manifestly connected without the aid of oral evidence as to justify their being read together on the principles stated in *Long* v. *Millar*,[50] *Sheers* v. *Thimbleby*[51] and *Stokes* v. *Whicher*.[52]

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[45] 4 C.P.D. 450.
[46] 13 T.L.R. 452.
[47] Ibid. 453.
[48] [1951] Ch. 383; [1951] 1 T.L.R. 531; [1950] 2 All E.R. 1212.
[49] 13 T.L.R. 451.
[50] 4 C.P.D. 450.
[51] 13 T.L.R. 451.
[52] [1920] 1 Ch. 411.

As to that, I would observe that I do not see how it could be possible without oral evidence to connect the cheque made out in favour of Holt, Beever & Kinsey with the receipt given by the plaintiff.

But quite apart from this, I think we are being invited to go beyond anything warranted by the cases in the way of reading documents together for the purpose of providing a memorandum to satisfy section 40.

To the cases already cited I would add *Studds* v. *Watson*[53] and *Oliver* v. *Hunting*,[54] neither of which, on their facts, went nearly as far as this. Some of the observations of Kekewich J. in the latter case are, I think, manifestly too wide.

The rule has no doubt been considerably relaxed since *Peirce* v. *Corf*[55] was decided in 1874, but I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40.

The laying of documents side by side may no doubt lead to the conclusion as a matter of res ipsa loquitur that the two are connected. But before a document signed by the party to be charged can be laid alongside another document to see if between them they constitute a sufficient memorandum, there must, I conceive, be found in the document signed by the party to be charged some reference to some other document or transaction.

In the present case the only document signed by the defendants is an ordinary cheque; that is to say, an order upon the defendants' bankers to pay a sum of money, the payees being a firm of solicitors. With the best will in the world, I find it quite impossible to spell out of this cheque any reference, express or implied, to any other document or to any transaction other than the order to pay a sum of money constituted by the cheque itself. The cheque, of course, gives no indication whatever of the purpose for which the payment was to be made, and I think it is clear that the mere fact that the payment must have been made for some purpose or for some consideration cannot reasonably be held to amount to a reference to some other document or transaction within the principle I have stated.

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[53] (1884) 28 Ch.D. 305; 1 T.L.R. 83.

[54] 44 Ch.D. 205.

[55] L.R. 9 Q.B. 210.

In *Stokes* v. *Whicher*[56] the receipt for the deposit was signed by the party to be charged, and obviously referred to another transaction in the shape of the payment of the deposit. That made it possible for the court to inquire as to the mode of payment, which proved to have been by cheque. The cheque was signed by the purchaser and read together with the receipt, and the document on which it was written (likewise signed by the party to be charged) constituted a memorandum including the purchaser's name, which, apart from the cheque, would have been missing.

This being a vendor's action, the receipt was not signed by the party to be charged and, consequently, no use can be made of any reference to the cheque which might be spelt out of the receipt.

For these reasons I would dismiss the appeal.

ROMER L.J. I agree, and I only wish to make a few observations on the points which arise out of section 40 of the Law of Property Act and which were argued before us. The first point to consider was Mr. Richmount's contention that assuming (which, of course, he did not admit) that the cheque and receipt of July 20, 1955, could together constitute a memorandum, nevertheless, as there was no reference in the receipt to the lease of August 14, 1950, the memorandum was insufficient in that respect.

If the fact, which was in truth known to the defendants at the time of the contract, that the property was being sold subject to and with the benefit of the lease ought to be regarded as a term of the bargain, I think that it is clear that it should have been mentioned in the memorandum, for it was a term which was obviously an important one, and the requirement that a memorandum must contain particulars as to the parties, price, and any other terms of the bargain except those implied by law

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[56] [1920] 1 Ch. 411.

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would not be satisfied. But I do not think that it was a term of the contract at all for relevant purposes.

It can be said, and has been said, that the proper way of looking at the matter is that the agreement was a mere contract for the sale of the freehold, and that such a contract gives rise to an implication of vacant possession, but that then a term was imposed that vacant possession would be deferred until the expiration of the lease, and that until then the defendants would merely be the landlords of the property and entitled to receive the rents. I do not think myself that that is the right way of regarding the contract.

It seems to me that the proper way of looking at it is that it was for the sale of a freehold reversion, which indeed the contracting parties intended it to be. Accordingly, the postponement of vacant possession and the immediate transfer to the purchasers of the lessor's rights and obligations under the lease were not a term of the bargain, but were inevitable incidents of the subject-matter of the sale.

On this view, the question would appear to be not whether the memorandum is insufficient for failing to mention an important term of the oral agreement, but whether it sufficiently describes the subject-matter of the sale. I think it does sufficiently describe the subject-matter. The agreement was in fact for the purchase of the freehold of the property. The memorandum specifies the property and parenthetically describes it as "freehold." The memorandum is not insufficient if it omits to mention the particular interest which the vendor is selling in the property, provided that the property itself is sufficiently described. If no interest is mentioned, then prima facie an unencumbered freehold interest will be implied. No such implication arises, however, if the purchaser knew at the time of the contract (as the defendants knew in the present case) that some lesser interest or some incumbered interest was to be the subject of the sale.

I cannot think that a memorandum fails in point of sufficiency if it omits an explanation of why the implication of an unencumbered fee simple is displaced or if it fails to specify the precise legal interest in the identified property which the vendor has agreed to sell and the purchaser agreed to buy, or if it makes no reference to encumbrances affecting the property. A right of way, for example, over land agreed to be sold is not a term of the contract of sale but a matter of title, and need not be mentioned in the memorandum.

Accordingly, in my view, the judge was wrong on that point, though, if it had been a term of the bargain, I would have agreed with his decision.

The next point Mr. Richmount took was whether the cheque and receipt taken together could form a memorandum having regard to the order in which they were signed. Mr. Richmount's argument as to that was that although two separate documents can together constitute a memorandum for the purposes of section 40, the party to be charged must have signed the second of the two; that is to say, if the defendant has signed a document, the plaintiff cannot rely on it in conjunction with a later document signed by himself. This in general must be true. A defendant cannot be bound by a document which he has not signed unless he has in effect incorporated it in the document which he has signed, in which case he would be regarded as having notionally signed both documents; but as he cannot be taken to have incorporated or signed a document which does not exist, the theory is inapplicable except where the defendant has signed the second of two documents on which the plaintiff relies as together constituting a memorandum.

However, if on the same occasion and as part of one and the same transaction—for example, as here, the payment of a deposit under an oral agreement for sale—a vendor and purchaser sit down at a table and respectively write out a receipt and a cheque, then assuming that these documents between them sufficiently evidence the terms of the bargain, it would be going too far to say that the vendor could not rely on them as constituting a memorandum if the purchaser signed his cheque a few seconds before the vendor signed the receipt. I think it is enough to say that the documents relied on were brought into being more or less contemporaneously for the purpose of furthering a bargain which the parties had made. This was substantially what happened in the present case.

In the circumstances in which, according to the evidence, the cheque and receipt were exchanged, it would, I think, be rather absurd to say that the receipt must be excluded from consideration on the ground that it came second in point of time, seeing that they both form part of one single transaction, and to all intents and purposes were signed and changed hands simultaneously at the meeting between Timmins and Chait on July 20, 1955.

But then Mr. Richmount takes a third point. He says that, even so, the cheque and the receipt cannot be treated together as a memorandum, for there is no sufficient indication on the face of the cheque that it related to the oral agreement on which the plaintiff is suing or to the receipt which the plaintiff signed. True it is, says Mr. Richmount, that the cheque and the receipt bear the same date, they both relate to the same amount, £3,900, and they both contain a reference to the defendants, Moreland Street Property Co. Ltd.; but whereas the cheque was made payable to Holt, Beever & Kinsey, the receipt was given by the plaintiff signing as trustee of James Keeves Trust. Accordingly, says Mr. Richmount, no one who looked at the documents would connect them up with the same transaction, and extrinsic evidence is not permissible to show that they did.

This appears to me to be a very formidable objection. The relevant principle of law which is applicable is Russell J.'s summary in *Stokes* v. *Whicher*,[57] to which my Lord has referred, of the decision in *Long* v. *Millar*.[58] He said [59]: "*Long* v. *Millar* [60] "comes to this: that, if you can spell out of the document a "reference in it to some other transaction, you are at liberty to "give evidence as to what that other transaction is, and, if that "other transaction contains all the terms in writing, then you "get a sufficient memorandum within the statute by reading the "two together."

The "reference" need not be express, but I cannot collect from the cheque any reference, even by implication, to the transaction in the course of which, and as part of which, the receipt was brought into existence. Had the plaintiff been the payee under the cheque, the position might have been different, though it is not necessary to decide that point. As it is, there seems to be nothing on the face of the cheque itself which connects it in any way with the sale agreement or with the receipt.

Mr. Ingress Bell said that a cheque is in a different category from such things as letters or postcards, and that of necessity it must be drawn with reference to some transaction; that the court is entitled and bound, therefore, to inquire into what that transaction was, and that such an inquiry in the present case would lead to the contract of sale and to the receipt which was brought into being in connexion with it.

Although this approach to the matter is not without attraction, I cannot myself adopt it. I think it would be going much further than is justified by any of the authorities which were cited to us to hold that the defendants' cheque in the present case may be regarded, simply on the ground that it was a cheque, as a sufficient reference to the oral agreement between the plaintiff and the defendants or to the deposit payable thereunder. I think that so to hold would constitute an unwarranted, and possibly dangerous, addition to the many judicial glosses which have already been put upon this legislation.

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[57] [1920] 1 Ch. 411.
[58] 4 C.P.D. 450.
[59] [1920] 1 Ch. 418.
[60] 4 C.P.D. 450.

It seems to me that the most favourable way in which the plaintiff's case could be put would be by adopting the argument of Mr. Clauson in *Stokes* v. *Whicher*[61] as stated by Russell J. He said[62]: "Mr. Clauson has put his case upon a higher "platform and said that, even if you do not get any reference, "either inferential or otherwise, in the second, the defective, "document to the first, the authorities go to show that if, "placing the two documents side by side, there is, upon an "inspection of them, such a physical state of affairs that it is "obvious that they were produced at the same time and that "they originally, to that extent, formed a single document, you "can take them and read them together, even though one "document does not by inference or in terms contain a reference "to the other. There is some colour for that proposition in "*Oliver* v. *Hunting*,[63] before Kekewich J., and more still in "the later case before the Court of Appeal of *Sheers* v. "*Thimbleby*.[64]"

I am not sure that Mr. Clauson was wholly relying for the purposes of his argument on the physical relation between the original and the carbon copy of the document which was there relied upon, because if one looks at the report of his argument, he seems to put it, first, in a general way. He said[65]: "If "there exist two documents and, putting them together side by "side, it is clear there is some connexion between them, that "admits parol evidence as to the circumstances under which "they came into existence." That appears to me to be a general proposition which Mr. Clauson was advancing. Then he said[65]: "Here there is the typewritten original and the exact counter- "part or duplicate in the carbon copy, and it would, as A. L. "Smith L.J. said in *Sheers* v. *Thimbleby*,[66] be 'sheer affecta- "'tion' to pretend they are not connected: *Long* v. *Millar*.[67]"

But even assuming both the generality and the validity of that argument, it does not, in my opinion, enable the plaintiff here to succeed, for if one places the cheque and the receipt side by side, it is not obvious on an inspection of them that they originally formed a single document and could be taken and read together. In view of the discrepancy between the payees on the cheque and the signatory of the receipt, it is by no means obvious that the two documents were connected with each other at all.

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[61] [1920] 1 Ch. 411.
[62] Ibid. 419.
[63] 44 Ch.D. 205.
[64] 13 T.L.R. 451.
[65] [1920] 1 Ch. 415.
[66] 13 T.L.R. 451.
[67] 4 C.P.D. 450.

SELLERS L.J. I agree. The difficult point in the case, as I see it, is whether the cheque for £3,900 signed by the defendant company by their director, L. Chait, can be read together with the receipt for that sum made out and signed by the plaintiff, so as to bring the defendants' signature into association with the terms of the receipt.

At the trial the plaintiff produced the cheque with the defendant company's signature thereon, and on discovery the defendants, as they were bound to do, disclosed the receipt, thereby recognizing and impliedly admitting that the receipt related to the payment made under the oral agreement on which the plaintiff sues in the action. Otherwise, the receipt would not have been a relevant document and would not have been disclosed or discoverable.

From those circumstances, without any further evidence, it would appear that the defendant company had had the receipt, had retained it, and had apparently accepted it, and thereby acknowledged the transaction in respect of which the payment by cheque had been made.

These facts provide evidence, and can leave little doubt, that the defendant company had been party to a transaction with the plaintiff in relation to the premises referred to in the receipt. The receipt was an adequate memorandum of the transaction; that is, it contained all the material terms, as both my Lords have held and with which I agree.

The bargain between the parties is thereby sufficiently evidenced in writing, but is it signed by the party to be charged, the defendant company? The authorities to which we have been referred and which have been reviewed in the judgments just delivered have gone a long way in seeking to avoid the statute doing an injustice, as it seems to me to be doing here. The plea of section 40 here is of mere technical application and does not leave one in any doubt that a concluded contract had been entered into. But the fact remains that the signature is to the cheque only and I do not find any satisfactory way of linking it up with the memorandum—that is, the receipt—so as to make the receipt or memorandum a document signed by the company.

If the judge had given his reasons for so doing, it might have been sufficient, for little more would be required to persuade me to uphold his finding, having regard to the way section 40 and its predecessor have been interpreted throughout the years. However, I agree with the conclusions to which my Lords have come.

Appeal dismissed.

Solicitors: *Holt, Beever & Kinsey; Israel, Joslin & Co.*

I. G. R. M.

BAUME & CO. LTD. v. A. H. MOORE LTD.

[1955 B. 72.]

1957
Oct. 22, 23.

Danckwerts J.

Trade Mark—Infringement—Bona fide use of own name, defence of—Whether applicable to use as a trade mark—Risk of confusion—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 8 (*a*).

Passing Off—Risk of confusion—Bona fide use of own name.

The plaintiffs, an English company, carried on the business of the sale of watches and were the proprietors of the registered trade mark "Baume." The defendant company, who carried on business in the sale of (inter alia) watches, sold watches bearing the mark "Baume & Mercier, Genève," or "Geneva"; these watches were manufactured by a Swiss company called Baume & Mercier, S. A., who had manufactured watches for many years.

In an action by the plaintiffs to restrain infringement of registered trade mark and passing off:—

Held, that, though there was some risk of confusion, the use of the name "Baume & Mercier, Genève," was a bona fide use on the defendants' goods of the name of the manufacturer; that section 8 (*a*) of the Trade Marks Act, 1938,[1] protected such use of the manufacturers' name as a trade mark; and that such bona fide use afforded also a defence to passing off.

C. & T. Harris (Calne) Ltd. v. *F. S. E. Harris* (1933) 51 R.P.C. 98; 50 T.L.R. 123 considered.

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[1] Trade Marks Act, 1938, s. 8: "No registration of a trade mark "shall interfere with—(*a*) any bona "fide use by a person of his own "name or of the name of his place "of business, or of the name, or of "the name of the place of business, "of any of his predecessors in "business . . ."

1957

BAUME & CO. LTD. *v.* A. H. MOORE LTD.

ACTION.

The plaintiff company, Baume & Co. Ltd., or their predecessors in title, had been trading as distributors and sellers of watches in this country for approximately one hundred years, and, since 1878, had been registered under the Trade Marks Acts as proprietors of the mark "Baume" (trade mark No. 14263) for watches and all other descriptions of horological instruments.

The defendants, A. H. Moore Ltd., were importers and distributors of watches and had for a few years past been importing into this country watches made by a Swiss firm of the name of "Baume & Mercier, Société Anonyme." These watches had been sold by the defendants in boxes bearing on the outside the words "Baume & Mercier, Genève," or, in some cases, "Geneva." The watches bore on the dial, and also on the inside of the movement, the same words "Baume & Mercier, "Genève," or "Geneva." At one time members of the family of "Baume" were connected with the Swiss firm.

The plaintiffs commenced an action against the defendants claiming (1) an injunction restraining them from infringing the plaintiffs' registered trade mark, No. 14263; (2) an injunction restraining them from advertising, offering for sale or selling watches or other horological instruments, not being the goods of the plaintiffs, under the name "Baume and Mercier" or any other name containing the word "Baume" and calculated to pass off or to enable others to pass off such watches or other horological instruments as and for the plaintiffs' watches or other horological instruments; (3) destruction, or obliteration on oath from all watches or other horological instruments, advertising or other matter in the possession, custody and control of the defendants of the word "Baume" or any word so nearly resembling the same as to be calculated to deceive; (4) an inquiry as to damages or at the plaintiffs' option an account of profits.

The defendants, by their defence, admitted that they had offered for sale, sold, and supplied watches bearing the mark "Baume & Mercier, Genève," and that all such watches were, in fact, watches manufactured by a Swiss firm of the name of "Baume & Mercier, S. A."; and they denied the alleged infringement of trade mark or that their use of the name "Baume" as part of the name "Baume & Mercier" was calculated to deceive or cause confusion.

John Whitford for the plaintiffs. The name adopted by the defendants is sufficiently similar to the word used by the plaintiff company to cause confusion. The name "Baume & Mercier" is used as a trade mark and infringes the plaintiffs' registered trade mark, and is calculated to pass off the defendants' goods as and for those of the plaintiffs. The defendants cannot claim the protection of section 8 of the Trade Marks Act, 1938, as entitling them to use the name "Baume." The provisions of that section only protect the owner of a name in so far as it is used in the sense of carrying on a trade and describing himself as such, and does not extend to the use of the name as a trade mark. [Reference was made to *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris*[2]; *Saville Perfumery Ltd.* v. *June Perfect Ltd.*[3]; *Joseph Rodgers & Son Ltd.* v. *W. N. Rodgers & Co.*[4]; *Wright, Layman & Umney Ltd.* v. *Wright*[5]; *Benz et Cie. (Application of) to register a trade mark*[6]; and *Electrolux Ltd.* v. *Electrix Ltd.*[7]]

F. E. Skone James for the defendants. The use of the word "Baume" by the defendants has been a bona fide and perfectly honest use and is protected by the provisions of section 8 of the Act of 1938: see *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris.*[8] The protection afforded by section 8 is not restricted to such narrow limits as the putting of the name of a person at the head of his notepaper and using it as part of the name of his company, and does not prevent him from honestly using a name connected with himself for the purpose of selling his goods.

DANCKWERTS J. This is an action for infringement of a trade mark and for passing off in respect of the sale of watches. The plaintiff company, Baume & Co. Ltd., or their predecessors in title, have been trading as distributors and sellers of watches in this country for approximately one hundred years, and, since 1878, the mark "Baume"—just a simple word—has been registered under the Trade Marks Acts and is the property of the plaintiff company.

The defendants, A. H. Moore Ltd., are importers and distributors of watches, and it would appear that for a few years past they have been importing into this country watches made by a Swiss company, that is to say, a société anonyme of the name "Baume & Mercier"; "Baume et Mercier, Société "Anonyme," is in fact the name of that company. The watches which have been so imported and sold by the defendants are sold, it would appear, in boxes bearing on the outside "Baume & "Mercier, Genève," or, in some cases, "Geneva," the sign in the middle being an ampersand, which is either "and" or "et" (in French). The watches bear on the dial, and also, it appears, on the inside, on the movement, the same words "Baume & "Mercier, Genève," or "Geneva." It is claimed by the plaintiffs that that constitutes an infringement of their trade mark "Baume," and also amounts to passing off by the defendant company.

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[2] (1933) 51 R.P.C. 98; 50 T.L.R. 123.

[3] (1941) 58 R.P.C. 147.

[4] (1924) 41 R.P.C. 277.

[5] (1948) 65 R.P.C. 185; reversed by (1949) 66 R.P.C. 149 (C.A.).

[6] (1913) 30 R.P.C. 177.

[7] (1953) 71 R.P.C. 23.

[8] 51 R.P.C. 98.

So far as the trade mark is concerned, the matter depends now on the Trade Marks Act, 1938, s. 4, which provides as follows in subsection (1): "Subject to the provisions of this "section, and of sections seven and eight of this Act, the "registration (whether before or after the commencement of this "Act) of a person in Part A of the register as proprietor of a "trade mark (other than a certification trade mark) in respect "of any goods shall, if valid, give or be deemed to have given to "that person the exclusive right to the use of the trade mark in "relation to those goods and, without prejudice to the generality "of the foregoing words, that right shall be deemed to be "infringed by any person who, not being the proprietor of the "trade mark or a registered user thereof using by way of the "permitted use, uses a mark identical with it or so nearly "resembling it as to be likely to deceive or cause confusion, in "the course of trade, in relation to any goods in respect of which "it is registered, and in such manner as to render the use of the "mark likely to be taken either (*a*) as being use as a trade mark; "or (*b*) in a case in which the use is use upon the goods or in "physical relation thereto or in an advertising circular or other "advertisement issued to the public, as importing a reference to "some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such "a person as aforesaid is connected in the course of trade."

It will be observed, in the course of that section, that the provisions of the section are subject to section 8 of the Act. [His Lordship read section 8 (*a*) and continued:] And then it goes on to deal with a description of the goods, which is not, I think, material in the present case.

The issues in the case, therefore, are, it appears, first, whether the use by importers of the name "Baume & Mercier, Genève," would be liable to cause confusion in the course of trade; and secondly, assuming that that is so, whether a defence is open to the defendants in respect of the trade mark under section 8 of the Act.

The defendants are, of course, not the manufacturers of the goods or the assemblers, or anything of the kind; they merely import them and distribute them, and their name is not in any way "Baume & Mercier," or anything like that. But it is accepted on both sides that, as the Swiss company to which I have referred are Baume & Mercier, S. A. (to use a very common abbreviation), if the goods using their name come within the provisions of section 8, then there is a defence to the action for the defendants.

As regards passing off, the position is very similar, the salient point really being whether the use of the name in the manner which has occurred is likely to cause confusion, and whether there is again a defence of honest user of the makers' own name.

Of course, the name used, Baume & Mercier, is not exactly the same as the name "Baume," which is the registered trade mark and is used in connexion with watches as a mark by the plaintiff company in the course of its trade. It would appear that in the past there was at any rate a family connexion between the predecessors of the plaintiff company in this country and the predecessors of the company Baume & Mercier in Switzerland. At one time, apparently, there was a brother in Switzerland and a brother in England, but it is also plain that for some time, at any rate, there has been no Baume connected with the company of Baume & Mercier, and it also appears that during the period when there were relatives in each of the two countries —in England and Switzerland—there may have been some co-operation between the two countries, and no sort of rivalry as regards trade in England. It appears that recently, that is to say, within the last few years, the Swiss company have been desiring to extend their trade of the sale of watches in this country, and it was in that way that the defendants came to import their watches and distribute them here.

A good deal of evidence has been given to suggest that in the watch trade customers are ready to distinguish one name from another, and also that the dealers in watches in this country are so used to different kinds of watches and different makes that they would not be likely to be misled into thinking that there was any connexion between the plaintiffs' watches and those sold by the defendant company. There is, however, also some evidence which supports the view that the ordinary unlearned public, not in the trade, might use the name of the Swiss company, or the name under which the Swiss watches are sold, abbreviated and that some confusion might occur. I should perhaps mention that the plaintiffs' watches are also made in Switzerland, at present by a firm or company called Mildia, and they are imported by the plaintiffs and distributed by them.

In a matter of this sort it is always rather difficult to see how far confusion really is likely or possible, and what exactly the public will do, in the absence of positive evidence of actual deception. On the whole, I have come to the conclusion that the names are sufficiently similar so that members of the public would not necessarily be likely to perceive that "Baume & "Mercier" was not the same as "Baume," and I think, therefore, that there is some probability that confusion might occur in England in respect of the sales of the watches.

I turn now to the second point, which seems to me of importance: whether there is a defence afforded to the defendants by the provisions of section 8 of the Trade Marks Act, 1938, and the corresponding sections in case law in respect of the law of passing off. It is quite true, as has been pointed out by Eve J. in *Jays Ltd.* v. *Jacobi*,[1] that the name of a limited company (or, it appears to me, the equivalent in Switzerland) is not really complete without the word "Limited" in England, or the expression "Société Anonyme" or the letters "S. A." abroad. In *Jay's* case [1] Eve J. did in fact refer to that as being a distinguishing feature, distinguishing the plaintiffs' trade from that of the defendants in that case. I do not myself think that the matter really is of decisive importance. One knows, as a matter of fact, that companies' names are very commonly used without the addition of the word "Limited," and I should imagine the same is true of a company incorporated in Switzerland, where one would be likely to refer to it simply as "Baume "et Mercier," particularly where the company is a successor of a business which has formerly been a partnership. That element, of course, is common to both the plaintiffs in this country and Baume & Mercier in Switzerland. Therefore, I think that the mere omission of the letters "S. A." or the words "Société "Anonyme" is not fatal to the defendants' reliance on section 8 and the corresponding defence in respect of passing off.

However, Mr. Whitford, on behalf of the plaintiffs, has put forward a point which has troubled me to some extent, partly because there does not seem to me to be very conclusive authority on the matter. He has contended that the provisions of section 8 only protect the use by a person or company of his own name generally in the sense of carrying on a trade and describing himself as such or giving his address with the name, and that where the name is used as a trade mark, then the defence is not available.

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[1] [1933] Ch. 411; 49 T.L.R. 239; 50 R.P.C. 132.

It is to be observed in considering this matter that in the defence it appears to be admitted on behalf of the defendants that "they have offered for sale, sold and supplied watches "bearing the mark 'Baume & Mercier, Genève.'" It appears to be admitted there that the use of that name has been as a mark—meaning, of course, a trade mark—and there is indeed, I think, evidence supporting that admission: that the use of the name Baume & Mercier on the watches, and indeed, I think, also on the boxes in which the watches were sold, has been the use of that name as a mark, indicating the origin of the goods in question. So far as the facts go, therefore, I think that it must be accepted that the defence of the defendants cannot prevail, unless the provisions of section 8 are sufficiently wide to cover use by a trader or manufacturer of his own name as a mark in respect of the goods which are sold under his name. Of course, besides the actual name of the company, Baume & Mercier, there appears the word "Geneva" or "Genève," and the watches of the company are in fact assembled in Geneva, so that the description which is an addition to the name is, it would seem, a correct description. As regards infringement, I should perhaps have mentioned that the addition of the word "Geneva" cannot, I think, save the defendants if there is otherwise risk of confusion, but obviously, so far as it is the use of the actual name of the manufacturer, the addition of the word "Geneva" or "Genève" assists rather than detracts from the defendants' case.

The only case in which the point now raised seems to have been considered is a decision of Farwell J. in *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris.*[2] There the defendant, whose name, I suppose, was F. S. E. Harris, was using the name "Harris" stamped on Danish bacon, and it was claimed by the plaintiffs that that was a passing off of the defendant's goods, and that his bacon could be confused with the plaintiffs' bacon, which was English bacon always and therefore not Danish. In the end, the judge held that there was no likelihood or risk of confusion at all because of the difference in the trade, and therefore in a sense everything that he said on the point which I am now considering may be said to be obiter. In that case Farwell J. is reported as making an interpolation in the course of the argument. Mr. Trevor Watson, on behalf of the defendant, said, apparently: "As regards the defence under "section 44"—that was the section which was the forerunner of the present section 8 in the present Trade Marks Act—"the "question is whether the mark used is a bona fide use of the "defendant's own name," whereupon Farwell J. said[3]: "Do "you say he can use his own name as a mark?" Mr. Trevor Watson replied: "Yes, the only rights the registered owner has "under the Act are set out in section 39, and these are the sole "rights of using the mark upon or in connexion with specified "goods, never a monopoly of it for a mere general trading. "These rights are cut down by section 44. Any bona fide use "by a person of his own name is permissible."

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[2] (1933) 51 R.P.C. 98.

The judgment of Farwell J., I think, does not really deal exactly with the question which has been raised by Mr. Whitford, and he uses some language which I find rather difficult to follow.[4] After reading section 44 of the Trade Marks Act, 1905, the judge continued: "It is said on behalf of the defendant that he is "making a bona fide use of his own name, and he is therefore "completely protected by section 44. Now, section 44 is in "wide terms, and it does provide in terms that no registration "shall interfere with any bona fide user by a person of his own "name. The defendant here is using his own name. In my "judgment, the only question which I have to determine upon "this section is whether such user is bona fide or not."

Therefore, the judge was apparently directing his mind to the effect of section 44, although it appears to me that the name simply of Harris, which the defendant was using, was not completely the defendant's own name, and, as appears from other cases, the possibility of confusion is increased by a person who uses only part of his name, and that might not necessarily be a defence to the action. Moreover, it seems fairly plain that as the defendant was simply stamping "Harris" on the Danish bacon, he was using the name Harris as a mark.

Then the judge goes on: "If it be bona fide, then I see no way "of escape for the plaintiffs from the effect of this section. I "agree with the argument which has been addressed to me on "behalf of the plaintiffs to this extent, that by using the words

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[3] 51 R.P.C. 102.

[4] Ibid. 109.

" 'bona fide' in that section it was not intended that the use " should merely not be fraudulent, or deliberate with an intention " to deceive, or anything of that kind, by the person whose own " name is being used. If in fact the use of the name does lead " to the result that that person's goods are being passed off as " the goods of another, although that may not have been the " intention of the person so using that name, and although he " may have a perfectly honest reason for using it, yet if in fact " the use of the name which the defendant makes is such that " it leads, or must lead, to a misrepresentation that the goods of " the defendant are goods of the plaintiff, then in my judgment " the defendant is not entitled to use his name, although it is his " own name and although he has not, and may never have had, " any fraudulent intention."

Now that is the passage which I find rather difficult to apply. I think I understand what "bona fide" normally means: it means the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader. But when I find the judge saying that there may be confusion which will take the case out of the bona fide use for the purposes of the section, I do find great difficulty in seeing what the standard is which is to be applied in a case of that kind. How much risk of confusion is necessary before the benefit of what appears to be quite a generally expressed section is lost? However, perhaps it is not necessary for me to consider that precise point in the present case, because I do not think that I can say in the circumstances of the present case that the use by Baume & Mercier S. A. of their name in the manner in which it has been used in the present case was not bona fide for the purposes of section 8.

I have still to deal with the point which I have already mentioned: whether the use by Baume & Mercier of that name as a mark, for the purposes of indicating the origin of the goods, in spite of the language of the section and in spite of its being (as I have held) their own name, as I have mentioned, is none the less not protected by the section. Section 8 is, it seems to me, expressed in general terms, and I agree with the suggestion which was put forward by Mr. Skone James in his argument, that if one is going to say that section 8 merely applies to things like putting the name of a person up above his business or possibly putting it at the head of his notepaper and using it as part of the name of his company, then it does seem that the protection provided by section 8 is of an extremely limited character, and I have come to the conclusion that it would not be right for me to put any such limitation upon the excepting provision, as I see it, to prevent a person being harried in respect of the perfectly innocent and honest user of a name connected with himself for the purposes of selling his goods. I think it would not be right to limit the section in the way which has been contended for by Mr. Whitford.

It seems to me that in the present case the use of the name in respect of the watches, in regard to which complaint has been made, is a bona fide use by the makers of their own name, and, therefore, is protected by the provisions of section 8. Accordingly, it seems to me that the defence prevails in this respect and the action must fail.

Judgment for the defendants.

Solicitors: *Cummings, Marchant & Ashton; Stollard & Limbrey.*

J. L. D.

1957
Oct. 24, 25.

Roxburgh J.

In re THIRLWELL, DECD. EVANS *v.* THIRLWELL.

[1957 T. 444.]

Power of Appointment—General power—Exercise—Will—No reference to power in residuary gift—Reference to two other powers in will—No expression of contrary intention—Whether first power exercised—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27.

A testatrix who had a general power of appointment under a settlement dated January 19, 1934, made no reference to the power in the residuary gift in her will made in 1953. In other clauses in her will she expressly exercised two other powers of appointment which she had under two other settlements:—

Held, that, since it could not be shown by reason of the language of the will or by necessary inference therefrom that the testatrix had in mind the power of appointment, and a person cannot be said to have an intention in relation to something which is not even in his mind, it could not therefore be shown that she had an intention that the residuary bequest should not operate as the exercise of the power, and the general rule that a residuary bequest was effective to dispose of property over which the testatrix had a general power of appointment applied.

In re Jarrett [1919] 1 Ch. 366 applied.

Thompson v. *Simpson* (1881) 50 L.J.Ch. 461; 44 L.T. 710 considered.

ADJOURNED SUMMONS.

A testatrix, Eliza Charlotte Thirlwell, had three general powers of appointment under three settlements dated respectively July 31, 1895, March 25, 1896, and January 19, 1934. By her will dated April 2, 1953, she referred to the powers contained in the settlements of 1895 and 1896 but made no reference to that of 1934. By this summons the trustee of her will asked whether under the residuary gift in her will she had exercised the power in the settlement of 1934. The relevant clauses of the will are set out in the judgment.

Charles Fletcher-Cooke for the plaintiff, trustee of the will.

A. P. McNabb for the first defendant, the residuary legatee. The residuary bequest in the will constituted an exercise of the power contained in the settlement of 1934 and was effective to dispose of the property which was to be subject to the general power contained in that settlement: section 27 of the Wills Act, 1837; *In re Jarrett.*[1] See also Jarman on Wills, 8th ed., pp. 809–815. The general rule that a residuary bequest operates to dispose of property subject to a general power is only displaced where a contrary intention is found in the will itself: *Boyes* v. *Cook.*[2] A general residuary bequest, in the absence of a contrary intention, operates as an exercise of a general power of appointment whether the will was made before or after the creation of the power: *Boyes* v. *Cook*[2]; *Airey* v. *Bower.*[3] In this case the will was in fact executed after the settlement of 1934; there is no contrary intention to be found in the will and accordingly the general rule applies. The onus lies on those who assert that the property subject to the general power does not pass under the residuary bequest to prove the contrary intention: *In re Jarrett.*[4]

The references in the will to the settlements of 1895 and 1896 are irrelevant on the question whether the power in the settlement of 1934 has been exercised and do not constitute a contrary intention within the meaning of section 27. The court will not find such contrary intention unless the will contains some provision which would make it inconsistent that the general bequest was meant to be an exercise of the power: *Scriven* v. *Sandom.*[5] A mere reference to the earlier settlements is not inconsistent with an intention to exercise the power in the settlement of 1934. The omission to refer to a power in a general bequest does not constitute a contrary intention and the mere reference to powers in the other settlements will not alter that position.

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[1] [1919] 1 Ch. 366.

[2] (1880) 14 Ch.D. 53.

[3] (1887) 12 App.Cas. 263.

[4] [1919] 1 Ch. 366.

[5] (1862) 2 J. & H. 743.

Mark Cockle for the second and third defendants, the life tenant and remainderman under the settlement of 1934. If clause 8 of the will stood alone it would, by virtue of section 27 of the Wills Act, 1837, exercise all general powers of appointment vested in the testatrix, but in clauses 11 and 12 the testatrix has expressly exercised two general powers of appointment. It is a matter of necessary implication that by expressly exercising those two powers the testatrix was not intending to exercise any power of appointment by clause 8, and a contrary intention excluding the section thus appears in the will: *Thompson* v. *Simpson* [6] and Jarman on Wills, 8th ed., vol. 2, p. 814.

Further, when clauses 8 and 13 are read together, a clear contrary intention excluding the section appears. By clause 13 the testatrix draws a clear distinction between "all the property "hereby appointed," which is that appointed by clauses 11 and 12, and her residuary estate, which is the property bequeathed and defined in clause 8, and then combines those two classes of property into one fund devolving in the same way. That is something which can fairly be described as inconsistent with an intention to exercise any power of appointment by clause 8: *Scriven* v. *Sandom* [7] and *In re Stokes.* [8] *Moss* v. *Harter* [9] is a case where it was held that there was a contrary intention, but there was no reference to the power of appointment in the will nor anything therein to show that the testator had the power in mind.

Arthur Bagnall for the fourth and fifth defendants, trustees of the settlement of 1934, supported the argument of *Cockle.*

ROXBURGH J. This is an interesting and almost uncharted area in which to start, and I must be careful not to state anything which is not admissible in evidence, for reasons which will hereafter appear; but I am entitled to say this: By a settlement dated January 19, 1934, and made between Philip John Le Riche, Eliza Charlotte Thirlwell, and Phyllis Eileen Carruthers of the one part, and Eliza Charlotte Thirlwell and Dennis Thirlwell of the other part, it was provided by clause 3 thereof that from and after the death of Eliza Charlotte Thirlwell the funds referred to in the said settlement should be held "upon trust both as to

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[6] (1881) 50 L.J.Ch. 461; 44 L.T. 710.

[7] 2 J. & H. 743.

[8] [1922] 2 Ch. 406.

[9] (1854) 2 Sm. & G. 458.

"capital and income thereof for such persons or purposes as the "said Eliza Charlotte Thirlwell shall by deed revocable or "irrevocable or by will or codicil appoint," and in default of appointment upon certain trusts. It is important to state that there were trusts, but it is not important to state what they were.

The three things to be derived from that are—and I think that it is all I am entitled to derive—that the testatrix had a general power of appointment, that in 1934, at any rate, she must have known so, because she was a party to the settlement, and that there were trusts in default of appointment.

By clause 8 of her will, dated April 2, 1953, she gave "all "the rest and residue of my property and effects whatsoever "and wheresoever and whether real or personal unto my "trustees upon trust that they shall sell . . . call in and "convert the same into money and shall stand possessed of the "proceeds of such sale calling in and conversion and of my "ready money (hereinafter called 'my residuary estate') upon "the trusts hereinafter declared concerning the same."

It is clear that that is, prima facie, a statutory exercise of the power of appointment. I take this summary from the judgment of Sargant J. in *In re Jarrett*[1]: "Prima facie the residuary "bequest is effectual to dispose of the property subject to the "testatrix's general power of appointment together with her "own property under section 27 of the Wills Act 'unless a "'contrary intention shall appear by the will,' and it is clear "that the onus lies on those who assert that the property "subject to the general power does not pass under the residuary "bequest to prove the contrary intention."

Those words of Sargant J. are, in my view, accurate. There is an onus on those who say that the residuary bequest does not operate to exercise the general power to prove the contrary intention from the will. How narrow that is must be obvious. It is indeed extraordinary how few are the cases in which that burden has ever been discharged when there has not been some express reference in the will to the instrument conferring the power, or something of that sort.

The position here is this: the testatrix, as appears from the will itself, had two other general powers of appointment. I will read the relevant clauses. Clause 11 is: "In exercise of the "power for this purpose given to me by clauses 4 and 5 of a deed "made in pursuance of articles for a settlement executed in

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[1] [1919] 1 Ch. 366, 370.

"contemplation of my marriage with my late husband Dennis "Thirlwell and dated July 31, 1895, . . . and of every and any "other power enabling me in this behalf"—and that, I am sure, is limited to that particular settlement—"I hereby direct and "appoint that the trustees for the time being of the first "settlement"—that is the settlement which I have been reading—"shall forthwith after my death raise out of the "moneys, stocks, funds, securities and property held subject to "the first settlement the sum of £18,000 if available and if not "then so large a sum as is available and shall pay the same to "my trustees absolutely to be held as part of 'the Combined "'Trust Funds' hereinafter mentioned and the trustees of the "first settlement shall hold the residue of the capital and "income of the trust premises in trust for my son the said "George Thirlwell absolutely. . . ." There is there a complete exercise of the general power of appointment conferred by that settlement.

Then clause 12 provides: "In exercise of the power given to "me by clause 10 of another deed made in pursuance of articles "for a settlement" executed in contemplation of marriage and dated March 25, 1896, "I hereby direct and appoint that the "trustees for the time being of the second settlement shall hold "all the moneys, stocks, funds, securities and property subject "to the trusts of the second settlement upon trust to pay or "transfer the same to my trustees absolutely as part of "'the combined trust funds' hereinafter mentioned subject "nevertheless to the payment of the annual sum of £500 "appointed to be paid to Augusta Beatrice Crossley (formerly "Charrington) for her life by the will of my late son Arthur "Leslie Charrington under and in pursuance of clause 9" of that settlement. That is an exercise of the general power under the second settlement.

Then clause 13 provides: "My trustees shall hold all the "property hereby appointed to them and also my residuary "estate and the investments for the time being representing the "same (hereinafter called 'the combined trust funds') upon "the trusts following," and then there are certain trusts set out.

First of all, I do not suggest that the contrary intention need be express. That would be contrary to the whole trend of authority, and I do not say that; but when one comes to inconsistencies—and it is quite clear that some inconsistencies are enough to provide sufficient evidence of contrary intention—it is necessary to be very careful. If the question were whether there was any indication that she intended to exercise the power under the settlement of 1934, the answer is plainly that there was not; but when the contrary intention has to be proved, in my judgment that can only be proved if it can be shown to the court as a fact that, by reason of the language of the will, or by necessary inference from the language of the will, the testatrix, having in mind the power of appointment, did not intend to exercise it. The words are "contrary intention," and though the word "intention" has been construed and reconstrued, and shaved round and round by judicial decisions in quite a different context, a person cannot be said to have an intention by reason of something which is not even in his mind. That is the real difficulty in this case.

If it had been proved to my satisfaction, either by something in the will, or by proper inference from something in the will, that the testatrix had the settlement of 1934 in mind, I should certainly have held that she had shown a contrary intention; but here I want to emphasize what Sargant J. said, that the burden is upon those claiming that the power has not been exercised to prove the contrary, not merely raise questions which might look as though the contrary be true.

This was a carefully drawn document, and it does refer specifically to two general powers. If it were my duty to speculate—but that is not my duty, because it is for those who contend that the power has not been exercised to prove something, and it is enough for me to say they have not proved it—but so far as I am entitled to speculate, the probability is that the testatrix did not have the settlement in mind at all. I say that because this was a very carefully-drawn will, obviously drawn by a competent draftsman, either by or on the instructions of a solicitor.

But do not let anybody say that I am deciding this case on speculation. My view is that it is the duty of Mr. Cockle's clients to prove the contrary intention, and they are far from having proved it to my satisfaction, and any views that I have are all to the contrary.

I want to make something clear, because there is one case which, to my mind, creates a difficulty, and I will refer to it in a moment. I am certainly not saying that in no circumstances could an inference be drawn from the fact that a testatrix had in truth exercised expressly one general power, and had not exercised expressly another. I will give an example in which I think such an inference would undoubtedly be drawn by the court: supposing the will said: "Whereas I have three general "powers of appointment under settlements A, B, and C respectively, now I hereby exercise the power under settlements A "and B," I think that the court would infer from that very language that she did not intend to exercise the power conferred by settlement C. Of course, that is not this case, but it is a possible case.

There is another possible case about which I should not care to express an obiter dictum, in which the court, if so advised, could find a contrary intention. Supposing the will said: "I give £500 "to James Smith mentioned in settlement A and in exercise of the "general power of appointment conferred by settlement B," and assuming there was a general power of appointment in settlement A, but no actual reference was made to that, it is quite possible that the court might, from that very language, draw the inference that there was a contrary intention shown to rebut the presumption that the general power conferred by settlement A was exercised.

I want to make that plain, because it is not necessary for me to say or suggest that the case to which I am going to refer is wrong; it is not necessary for me to suggest that at all, because only somebody who has made some great research in the Record Office can ever know what the grounds were on which the judge in that case reached his conclusion. It is quite possible that there were sufficient grounds in that case for the conclusion at which the judge arrived. The case is *Thompson* v. *Simpson* [2]; it is not well reported anywhere. There are two reports, and I think that the most useful is that in the Law Journal Reports; but it is also reported in the Law Times Reports. The headnote reads [3]: "By a settlement certain real estate was conveyed "to trustees, upon trust to sell, and to pay the proceeds of sale "to such persons as A should by deed or will appoint. By a "second deed of settlement A appointed that the trustees of the "first settlement should stand possessed of the sale moneys in "trust for such persons as she should by will appoint. By her "will, made previously to the second settlement, A, 'in pursu-"'ance of' the power contained in the first settlement, appointed "the property comprised therein (describing it as real estate) to "her three sons."

The judgment was to this effect [4]: "Then what was the effect "of the will of Elizabeth Simpson? Was it revoked by the

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[2] (1881) 50 L.J.Ch. 461; 44 L.T. 710.

[3] 50 L.J.Ch. 461.

[4] Ibid. 463.

" subsequent settlement, or did it execute the power contained " in that settlement? My impression is, that it was revoked by " the subsequent settlement. But, if not revoked, it did not, " in my opinion, execute the power in the subsequent settlement, " because it expressly refers to the power contained in the first " settlement. It was, therefore, inoperative to pass any part of " the property."

I have no doubt, when I compare the reports in the two different series of reports, the Law Journal Reports and the Law Times Reports, that there was much more in the judgment. They are not the same, and obviously they are both incomplete. I need not pursue that question further, however, because I have already agreed that it may well be that there are circumstances which are admissible, plus inferences to be drawn from the language of the will itself, which may lead to the conclusion that in the particular case the reference to one power is enough to negative the intention to exercise another. But it must, after all, depend on the facts of this particular case, and, as I have said already, there is no reason to say that the settlement of 1934 was in the mind of the testatrix at all at the date when she made her will. If that be so, I am unable to infer that she did not intend to exercise the power which it is not proved that she had in her mind at all. I appreciate the argument which Mr. Cockle sought to found on reading clauses 8 and 13 together, but, in my judgment, that is really begging the question. If the court were satisfied that she had the settlement of 1934 in her mind, then it would be true to say that there would be a sufficient contrary intention here, for many reasons. First of all, as I have already said, I should expect something to be said about it, and nothing is said about it. On that basis, it would be very strange that she should have expressly exercised the two powers and left it to the statute to exercise the other one. One can pursue that right through, and say: Why did she separate the two funds—or, rather, keep the two separate until she combined them? The answer to that is, that if she had it in mind it would be impossible to answer this question, but if she did not have it in mind the answer is obvious. It seems to me, therefore, that it all comes back to the matter which I have tried to consider, because, curiously enough, though it must be a case which arises fairly often in broad outline, with the exception of the unsatisfactory report of *Thompson* v. *Simpson*,[5] there is no case at all on this point to be found in the books.

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[5] 50 L.J.Ch. 461.

I will add, finally, that the argument has to be tested by the fact that the burden of proof of the contrary intention laid down by the statute is very heavy, and it can very seldom be proved—I emphasize the words "very seldom."

In this case I hold that the testatrix has exercised her general power of appointment.

Declaration accordingly.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; Robinson & Bradley.*

I. G. R. M.

1957
May 23;
June 6.

Wynn-Parry J.

In re MEUX, DECD. GILMOUR *v.* GILMOUR AND OTHERS.

[1957 M. 641.]

Town and Country Planning—Compensation—Land held on trust for sale—Compensation not to be treated as proceeds of sale arising under trust for sale—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 28 (1)*—Settled Land Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 58 (1)*—Town and Country Planning Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 66 (1)*—Town and Country Planning (Mortgages, Rent-charges, etc.) Regulations,* 1955 (*S.I.* 1955, *No.* 38), *reg.* 10.

Trust and Trustee—Variation of trusts—Infant tenant in tail in remainder—Proposal that infant's entailed interest be sold to tenant for life and purchase price be paid to trustees of new settlement for the infant's benefit—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 53.

By his will, the testator devised various lands to trustees on trust for sale and directed that the proceeds of sale thereof be held on trust for G. for life with remainder to his infant sons successively in tail male with remainders over. Under Part I of the Town and Country Planning Act, 1954, special payments for depreciation of land values were made in respect of part of the lands, and, in respect of other parts, compensation would be paid in accordance with Parts II and V of that Act. It had been held that the compensation moneys received or to be received were to be treated as capital and not as income of the trust, and on a summons to determine whether those moneys were applicable under section 28 (1) of the Law of Property Act, 1925, in the same manner as if they represented proceeds of sale arising under the trust for sale contained in the will, regard being had to section 66 of the Town and Country Planning Act, 1954, and regulation 10 of the Town

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[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955:—

Held, that the compensation moneys were not proceeds of sale arising under the trust for sale within the meaning of section 28 of the Law of Property Act, 1925.

In re Lord Penrhyn's Settlement Trusts [1923] 1 Ch. 143; 39 T.L.R. 116 distinguished.

The testator's residuary estate was settled on trust to pay the income thereof to G. for life, with remainder to G.'s first and other sons successively in tail male with remainders over. D., an infant, the eldest son of G., was the tenant in tail in remainder. G. applied to the court for an order under section 53 of the Trustee Act, 1925, that a person be appointed to convey to G. D.'s entailed interest, with the consent of G. as protector, in consideration of a proper purchase price to the intent that that purchase price should be applied for D.'s benefit by paying it to the trustees of a settlement to be created for that purpose:—

Held, that the transaction should be treated as a single transaction amounting to an application for the benefit of the infant within the meaning of section 53 of the Trustee Act, 1925, and accordingly the court had jurisdiction to make the order, and would do so.

In re Heyworth's Contingent Reversionary Interest [1956] Ch. 364; [1956] 2 All E.R. 21 distinguished.

ADJOURNED SUMMONS.

The testator, Sir Hedworth Meux, died on September 20, 1929, and by his will dated September 5, 1927, after appointing trustees of the will, of whom the plaintiff was one, gave his residuary realty and personalty to his trustees on trust for sale and settled the residuary trust fund on certain trusts. The income of the fund was now payable to the plaintiff in these proceedings, Ian Hedworth John Little Gilmour, during his life with remainder to his first and other sons successively in tail male, with remainder to his sister in tail male, with remainders over. The plaintiff had three sons, all of whom were infants. As a result of certain parts of the unsold realty being designated as land to be used for agricultural purposes, compensation moneys had been received from the Central Land Board by the trustees under Part I of the Town and Country Planning Act, 1954, and other payments were expected to be made under Parts II and V of that Act.

The present summons was taken out to determine (inter alia) the following questions (1) whether upon the true construction of the testator's will the principal amount of the compensation which had been paid under Part I and which was receivable under Parts II and V of the Town and Country Planning Act, 1954, in respect of land subject to the trusts affecting the testator's residuary estate ought to be treated (a) as capital of the residuary estate or (b) as a casual profit payable to the plaintiff as the person entitled under the will to the rents and profits of such land or (c) in some other and, if so in what, manner; (2) If the answer to 1 (a) above was in the affirmative whether upon the true construction of section 66 of the Town and Country Planning Act, 1954,[1] and the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955,[2] the principal amount of the compensation was applicable under section 28 of the Law of Property Act, 1925,[3] in the same manner as if the same represented proceeds of sale of land arising under the trust for sale contained in the will.

Paragraph (6) of the summons sought an order under section 53 of the Trustee Act, 1925,[4] appointing a person to convey to the plaintiff the entailed interest of the infant defendant, David Robert Gilmour in the residuary trust estate (with the consent of the plaintiff as protector) in consideration of a proper purchase price, with a view to such purchase price being applied for the benefit of the infant by the payment thereof to the trustees of a settlement (exhibited in the proceedings) for the benefit of the infant.

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[1] Town and Country Planning Act, 1954, s. 66: "Regulations made "under this section may make provi- "sion as to the exercise of the right "to apply for a payment under "Part I of this Act, or to claim "compensation under Part II or Part "V thereof, and as to the person to "whom any such payment or com- "pensation or any part thereof is to "be paid and as to the application "of any such payment or compensa- "tion or any part thereof, in cases "where, apart from this section, the "right to apply for the payment, or "to claim the compensation, as the "case may be, is exercisable by "reference to . . . (*b*) an interest in "land which is subject . . . to the "trusts of a settlement, or which was "so subject at a time specified in the "regulations."

[2] Town and Country Planning (Mortgages and Rentcharges, etc.) Regulations (S.I. 1955, No. 38), regulation 10: "Where the right to make "application for any payment under "any of the provisions of Part I of "the Act, or to claim any compensa- "tion under Part II or Part V of the "Act, becomes exercisable by refer- "ence to an interest in land which "is, at the time when the said right "is exercisable, subject to a settle- "ment, then—(*a*) the right to make "the application or to claim compen- "sation, as the case may be, shall "be exercisable by the trustees of the "settlement; (*b*) where an applica- "tion or claim has been made by "reference to such an interest as "aforesaid and a payment falls to "be made, or compensation falls to "be paid, the principal amount of "the payment and the interest there- "on or the compensation (including "in the case of compensation under "Part V of the Act the interest "thereon) shall be paid to the trus- "tees of the settlement."

[3] Law of Property Act, 1925, s. 28 (1): "Trustees for sale shall, in "relation to land or to manorial inci- "dents and to the proceeds of sale, "have all the powers of a tenant for "life and the trustees of a settlement "under the Settled Land Act, 1925, ". . . and . . . all capital money "arising under the said powers shall ". . . be applicable in the same "manner as if the money represented "proceeds of sale arising under the "trust for sale."

[4] Trustee Act, 1925, s. 53: "Where an infant is beneficially en- "titled to any property the court "may, with a view to the application "of the capital or income thereof for "the maintenance, education, or "benefit of the infant, make an order "(*a*) appointing a person to convey "such property . . ."

On the first question, which does not call for a report, Wynn-Parry J. made a declaration in the terms of paragraph 1 (a) and then proceeded to hear argument on question 2.

Geoffrey Cross Q.C. and *J. A. Brightman* for the plaintiff. Because of the definition of the word "sale" in section 203 of the Law of Property Act, 1925, the principal compensation moneys cannot be treated as actual proceeds of sale within the meaning of those words in section 28 (1) of that Act. However, by section 58 (1) of the Settled Land Act, 1925, a tenant for life is empowered, inter alia, to "compromise, compound . . . or "otherwise settle any claim . . . relating to the settled land." It is submitted that the word "claim" as used in that subsection includes a claim under the Town and Country Planning Act, 1954, and therefore if any moneys are receivable under that Act, then, because of the Settled Land Act power, such moneys must be treated by the trustees of the will as moneys representing proceeds of sale under the trust for sale. The character of proceeds of sale is given to these moneys by section 66 of the Town and Country Planning Act, 1954. The regulations made under that section do not contain any provision about how the compensation paid by virtue of the Act is to be applied, though it is submitted that the Minister has the right to make regulations dealing with this point. Because such regulations have not been made, there is a gap in legislation, but by necessary implication in the case of compensation payable in respect of land subject to the trusts of a settlement, such compensation must be treated on the same footing as proceeds of sale. Reliance is placed on *In re Lord Penrhyn's Settlement Trusts.*[5]

In subsection (2) of section 66 of the Town and Country Planning Act, 1954, the purposes authorized for the application of capital money by section 73 of the Settled Land Act, 1925, and by that section as applied by section 28 of the Law of Property Act, 1925, in relation to trusts for sale, includes the payment of a sum recoverable under section 29 of the Town and Country Planning Act, 1954.

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[5] [1923] 1 Ch. 143; 39 T.L.R. 116.

E. I. Goulding for the fifth and sixth defendants, two of the trustees of the will. To succeed, the plaintiff must show that the compensation moneys are within section 28 of the Law of Property Act, 1925. He had not done this. Compensation money is not land nor manorial incidents. It might conceivably be proceeds of sale. It is not, however, proceeds of sale under the statute, nor is it capital money arising under the powers of the Settled Land Act, 1925. All that Lawrence J. was considering in *In re Lord Penrhyn's Settlement Trusts* [6] was whether the money concerned was to be treated as capital or income.

Implications in statutes have been held to be difficult things to find. The submission is that the implication which the plaintiff seeks to make is not at all necessary. The Minister has not thought fit to say anything about the application of compensation moneys, although he is empowered to do so. The court should always be slow to read words into a statute: *Tinkham* v. *Perry.*[7] The section concerned will operate successfully without further regulations or the implication now sought to be made.

Cur. adv. vult.

June 6. WYNN-PARRY J. read the following judgment: I have already declared that the principal amount of the compensation which has been paid under Part I and is receivable under Parts II and V of the Town and Country Planning Act, 1954, in respect of land subject to the trusts affecting the residuary estate of the testator ought to be treated as capital of the residuary estate. The question which now arises is whether the principal amount of that compensation is applicable under section 28 of the Law of Property Act, 1925, in the same manner as if it represented proceeds of sale of land arising under the trust for sale contained in the will.

It is accepted by Mr. Cross, for the plaintiff, that, having regard to the definition of the word "sale" in section 205 of the Law of Property Act, 1925, the principal of the compensation in question cannot be regarded as actual proceeds of sale within the meaning of the phrase "proceeds of sale" at the beginning of section 28 (1) of that Act. So there has to be another approach to this problem, and it is made in this way. Section 28 (1) of

[6] [1923] 1 Ch. 143.

[7] [1951] 1 K.B. 547; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

the Law of Property Act, 1925, so far as material, reads thus: [His Lordship read the relevant part of the subsection and continued:] One of the powers conferred on a tenant for life under the Settled Land Act, 1925, is that contained in section 58 (1) which, so far as material, reads as follows: " A tenant for life " may, with the consent in writing of the trustees of the settle- " ment, either with or without giving or taking any consideration " in money or otherwise, compromise, compound, abandon, " submit to arbitration, or otherwise settle any claim, dispute, " or question whatsoever relating to the settled land, or any part " thereof . . ."

" Claim " in that subsection, it is said, includes a claim under the Town and Country Planning Act, 1954, whether the claim arises under Part I, Part II, or Part V of that Act and therefore any money received, or receivable, under that Act is received, or receivable, by virtue of the exercise of a Settled Land Act power, and is therefore to be treated in the hands of the trustees of the will of the testator " as if the money represented " proceeds of sale arising under the trust for sale."

This is an ingenious argument. Whether it is sound or not depends upon whether or not section 58 (1) of the Settled Land Act, 1925, comes into operation at all. In my opinion, it does not. The principal amount of the compensation paid under Part I of the Town and Country Planning Act, 1954, was determined as a result of a claim established under Part VI of the Town and Country Planning Act, 1947, while the principal amounts received under Parts II and V of the Town and Country Planning Act, 1954, will be determined under the machinery contained in those respective Parts of that Act. It appears to me, therefore, that section 58 (1) of the Settled Land Act, 1925, does not affect the matter at all.

It follows, therefore, that if the compensation moneys are to be treated as stamped with the character of " proceeds of " sale," this character must have been given to them by some provision in the Town and Country Planning Act, 1954. The section which was relied on as achieving this is section 66. Subsection (1) of that section, so far as material, reads: " Regulations " made under this section may make provision as to the exercise " of the right to apply for a payment under Part I of this Act, " or to claim compensation under Part II or Part V thereof, and " as to the person to whom any such payment or compensation or " any part thereof is to be paid and as to application of any such " payment or compensation or any part thereof, in cases where, "apart from this section, the right to apply for the payment, or "to claim the compensation, as the case may be, is exercisable "by reference to—(b) an interest in land which is subject to the "trusts of a settlement, or which was so subject at a time "specified in the regulations . . ."

Mr. Cross pointed out that the regulations made under section 66 contain no provision "as to the application of any "such payment or compensation," which words, he contended, were apt to confer on the Minister the right to make a regulation directing that compensation money should, in the hands of trustees for sale, be treated as proceeds of sale; and I agree with him, first, because these words must be taken as indicating something different from the mere destination of the compensation moneys, their destination having been dealt with by the preceding phrase "as to the person to whom any such payment "or compensation or any part thereof is to be paid"; and secondly, because of the language of subsection (3). That subsection reads: "Any sum payable under this Act in relation "to land which is, or on the first day of July, nineteen hundred "and forty-eight, was, ecclesiastical property, being a sum which "apart from this subsection would be payable to an incumbent, "shall be paid to the Church Commissioners to be applied for "the purposes for which the proceeds of a sale by agreement of "the land would be applicable under any enactment or Measure "authorizing, or disposing of the proceeds of, such a sale; and "where any sum is recoverable under section twenty-nine, forty-"one, forty-six or fifty-seven of this Act in respect of such land, "the Church Commissioners may apply any money or securities "held by them in the payment of that sum."

It will be seen that the sum in question is to be treated as having a particular character and to be dealt with accordingly. The difference between subsection (1) and subsection (3) is that in subsection (1) the attribution of the particular characteristic is to be effected by the Minister, while in subsection (3) it is effected by the subsection itself.

If, however, Mr. Cross is right a gap exists which can only be bridged by the action of the Minister in making a further regulation. Alternatively, Mr. Cross says that by necessary implication compensation must, at any rate in the case of compensation payable in respect of land subject to the trusts of a settlement, be regarded as being in the same position as proceeds of sale.

In his approach to this aspect of the case Mr. Cross referred me to *In re Lord Penrhyn's Settlement Trusts.*[1] In the course of his judgment P. O. Lawrence J. said: "In these circum-"stances, the question I am asked to decide falls, in my opinion, "to be determined on principle. Mr. Howard Wright has "referred me to the following passage in the judgment of James "L.J. in *In re Barker*[2] as laying down the true principle applic-"able to such cases as the present—namely: 'There seems to me "'to be a broad general principle underlying all these questions, "'which is this, where property is taken compulsorily from any "'person who is not sui juris, and who is not competent to make "'the subsequent alteration in the disposition or the devolution "'of that property, which would naturally follow such a change, "'the presumption is, if the words of the Act of Parliament "'really admit of that interpretation, that the legislature did "'not intend to interfere with any legal rights or any legitimate "'expectations of any persons whatsoever.'" His Lordship then continues: "In my judgment, Mr. Howard Wright is right "in his contention that this passage accurately expresses the "principle applicable to the present case. Here we have a "right of patronage which, at the date of the passing of the "Act, was settled in favour of a tenant for life with remainders "over. This right was compulsorily extinguished and a sum of "money has been paid in compensation for such extinction. "Applying the broad general principle referred to by James L.J. "the result is that the amount awarded for compensation must "be held, as far as possible, upon the same limitations as the "right of patronage was held at the date of its extinction. This "can best be accomplished by treating it as if it were capital "money arising under the Settled Land Acts."

So be it, but approaching the matter with this broad principle in mind, I still have to find sufficient material to justify me in drawing the inference which Mr. Cross asks me to draw. In this connexion it is to be remembered that the court is always hesitant to read words into a statute. For instance, in *Tinkham* v. *Perry*[3] the Master of the Rolls said: "Words plainly should "not be added by implication into a statute unless it is necessary "to do so to give the language sense and meaning in its "context . . ."

Mr. Cross's argument is based on the circumstance that in subsection (2) of section 66 of the Town and Country Planning

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[1] [1923] 1 Ch. 143, 147; 39 T.L.R. 116.

[2] (1881) 17 Ch.D. 241, 243.

[3] [1951] 1 K.B. 547, 549; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

Act, 1954, the purposes authorized for the application of capital money by section 73 of the Settled land Act, 1925, and by that section as applied by section 28 of the Law of Property Act, 1925, in relation to trusts for sale is to include (inter alia) the payment of a sum recoverable under section 29 of the Act [of 1954], which, so far as material, reads: "(1) No person shall "carry out any new development to which this section applies, "on land in respect of which a notice (in this section referred to "as a 'compensation notice') is registered under the last pre-"ceding section, until such amount (if any) as is recoverable "under this section in respect of the compensation specified in "the notice has been paid or secured to the satisfaction of the "Minister." It is said that as a repayment under section 12 of compensation moneys is regarded as one of the purposes for which trustees for sale can apply proceeds of sale in their hands, so it follows that section 66 presupposes that the compensation money must itself be in the position of proceeds of sale. Mr. Cross admits that this argument involves implying something into section 66 (1) of the Town and Country Planning Act, 1954. In my view, I can only make the implication which I am asked to make, if on a review of the section I am forced to the conclusion that "it is necessary to do so to give the language sense "and meaning in its context."

Two difficulties present themselves: First, as I construe the earlier part of the section which I have read, it is open to the Minister to fill the gap which Mr. Cross seeks to fill by implication. Secondly, it appears to me that the section can be made to work without either a further regulation or the introduction of any implication, though the result will not be that which the plaintiff desires to obtain. It appears to me that if the section is applied as it stands, the destination of any compensation money is certain, because the regulations which have been made, namely, the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955, provide for this by regulation 10. The compensation money, when received by the trustees, will be held by them on the relevant trusts declared by the will, though it will not be deemed to be proceeds of sale.

In arriving at the conclusions to which I have come, I feel a certain degree of sympathy with the applicant. It is true that moneys received by the trustees as compensation money are received by them, although they part with no land; but this payment is clearly referable to the land; it is paid because the land is regarded as having suffered a depreciation; but whether or not compensation moneys are to be regarded as proceeds of sale is a matter of policy with which I am not concerned. The legislature can, of course, deal with the question if so minded, and so, in my view, can the Minister by appropriate regulations; but as matters stand, it is not open to me, for the reasons which I have given, to treat the compensation in question in the hands of the trustees of the will as " proceeds of sale " for the purposes of section 28 of the Law of Property Act, 1925.

I must, therefore, answer question 2 in the negative.

J. A. Brightman for the plaintiff, dealing with question 6 of the summons. The court has jurisdiction under section 53 of the Trustee Act, 1925, to appoint a person to convey the infant's estate tail to the life tenant. *In re Gower's Settlement* [4] demonstrates this. A difficulty arises because of the decision in *In re Heyworth's Contingent Reversionary Interest* [5] that an infant's property can only be sold under that section with a view to the application of the proceeds for the infant's maintenance, education or benefit. There, however, the proceeds of sale were intended to be held in trust for the infant absolutely, which involved no " application." In the present case the proceeds of sale cannot be held in trust for the infant absolutely. They must necessarily be paid to the trustees of a settlement set up for the infant's benefit, so that the interests of the beneficiaries entitled in remainder after the infant can be restored. Such a payment to the trustees of a settlement is an " application " of money for the infant's benefit: see *In re Ropner's Settlement Trusts.*[6]

S. W. Templeman for the first, second and third defendants, the infant sons of the plaintiff.

E. I. Goulding for the fifth and sixth defendants. The word " apply " in section 32 of the Trustee Act, 1925, and the word " application " in section 53 of the same Act should be given the same meaning. In this case two transactions, not one, are involved. First, there is a sale, and, secondly, there is the application of the proceeds of sale to the trustees of the proposed settlement. It is the sale of the reversion alone which produces the benefit to the infant; that benefit amounts to a freedom from liability to estate duty, and the application of moneys by way of

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[4] [1934] Ch. 365.

[5] [1956] Ch. 364; [1956] 2 All E.R. 21.

[6] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.

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the proposed settlement is something which will not benefit the infant. The application must be beneficial and that alone can justify the sale.

WYNN-PARRY J. The next question with which I have to deal is question 6. [His Lordship read paragraph 6 of the summons and continued:] There is no doubt that under section 53 of the Trustee Act, 1925, the court has jurisdiction within the ambit of that section to appoint a person to convey the estate tail of the infant concerned. That is, I think, to be taken as demonstrated by *In re Gower's Settlement.*[7] The result of that operation would be to disentail the first defendant's estate tail. It would then be proposed (and it is put forward as being a necessary part of a single transaction) that the proceeds of sale should be paid over to the trusts of a settlement, the suggested form of settlement being Exhibit "A.R.H." to the affidavit in support of the summons. The terms of that settlement are not, of course, final. If I should decide that I have jurisdiction in the matter, no doubt the final terms of the settlement would be brought before the court in chambers and finally settled then; but, generally speaking, the object sought to be achieved by the intended settlement is to resettle or to settle the proceeds of sale virtually on the same terms as the residuary estate is settled, except, of course, that the plaintiff would have no interest in the settlement and the first defendant would have a contingent, as opposed to a vested, interest.

The question of jurisdiction has been argued, and it was, of course, necessary to argue that point because, however beneficial the transaction may be said to be on behalf of the first defendant and the other persons who would be entitled in succession if the proposed settlement were executed, nothing could be done towards carrying the transaction into effect unless it is established that the court has jurisdiction in the matter. The difficulty, which was very properly put forward by Mr. Brightman, is created by the decision of Upjohn J. in *In re Heyworth's Contingent Reversionary Interest.*[8] In that case there was an agreement between a tenant for life and the reversioner, expectant on her death, that the tenant for life should purchase the contingent reversionary interests. The arrangement was made in order that the reversioners might receive an immediate absolute interest in a sum of cash in exchange for their future contingent interests.

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[7] [1934] Ch. 365.

[8] [1956] Ch. 364; [1956] 2 All E.R. 21.

One of the reversioners was an infant, and the proposed transaction, though for her benefit, was not necessary for her education or maintenance. On the application being made to Upjohn J. he held that he had no jurisdiction under the Trustee Act, 1925, section 53, nor (though I am not concerned with this) under the inherent jurisdiction of the court. Prima facie, that case appears to be very close to the present case, but, as was pointed out, there is this distinction, namely, that, as it is put forward, it is an essential part of the transaction here envisaged that the proceeds of sale arising as a result of the sale under section 53 are intended to be settled, whereas in *In re Heyworth's Contingent Reversionary Interest*[9] the proceeds of sale were intended to be handed over to the infant absolutely.

In the course of his judgment Upjohn J., having read section 53, said[10]: "It is to be observed that the section does not authorize the court to convey an infant's property merely because "it is for his or her benefit, but only 'with a view to the application of the capital or income thereof for the maintenance, "'education, or benefit of the infant.' It was faintly suggested "in evidence that this transaction was necessary in order to "provide an income to enable Susan to continue her training in "London as a student nurse and, if that had been established, I "do not doubt that the court has ample jurisdiction to sanction "the arrangement, but the facts did not bear serious examination. Susan has, in fact, been maintained as a student nurse "out of other funds for nearly two years, although admittedly "by way of advances rather than out of income, and it cannot "be seriously suggested that this deed is necessary to enable "her to be maintained down to her twenty-first birthday. Susan "will then obviously execute the deed on attaining her majority, "so no post-infancy period can be called in aid and Mr. Jennings "did not seriously press this point. I accept also the argument "that the phrase 'maintenance, education, or benefit' are words "of the widest import. It covers not merely expenditure but "capital investment such as the purchase of a house to live in "or a share in a partnership, or even in some cases placing of "money on deposit for an infant: *In re Vestey's Settlement.*[11] "However, to bring the jurisdiction into play, there must be 'a "'view to the application' of the capital or income for the "maintenance, education or benefit of the infant. Mr. Jennings "concedes that that phrase is equivalent to 'for the purpose of

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[9] [1956] Ch. 364.

[10] Ibid. 370.

[11] [1951] Ch. 209; [1950] 2 All E.R. 891.

" 'applying.' Shorn of the niceties of legal argument, this deed " is intended to put an end to the trusts created by the settlement, by enlarging the interest of the life tenant to include " some or all of the reversioners' interests by means of a sale " of those reversionary interests for cash. The infant (inter " alios) receives an immediate absolute interest in a sum of cash " in exchange for a future contingent interest. The deed is not " in the least degree entered into with a view to the application " of, or for the purpose of applying, any capital or income of the " infant for her benefit. If I sanctioned this scheme on behalf " of the infant I should be reading the section as though it " empowered the court to convey the property of an infant whenever it was for her benefit. Unfortunately, the section only " confers a more limited jurisdiction."

The apparent difficulty created by that case is to some extent solved by the circumstance that it has been held by Harman J. in the recent case of *In re Ropner's Settlement Trusts* [12] that where there was a power of advancement in a settlement and it was proposed to make an advancement, or a number of advancements, to beneficiaries, the amount advanced in each case to be settled, that that was an application within section 32 of the Trustee Act, 1925.

That section opens with the words: " Trustees may at any " time or times pay or apply any capital money subject to a trust, " for the advancement or benefit, in such manner as they may, " in their absolute discretion, think fit, of any person entitled " to the capital of the trust property . . ."

Section 53 opens with the words: " Where an infant is " beneficially entitled to any property the court may, with a " view to the application of the capital or income thereof for " the maintenance, education, or benefit of the infant, make " an order. . . ."

In my view, it is rightly said that the word " apply " in section 32 and the word " application " in section 53 should be given the same meaning; and, in my view, the proposal in this case, which involves transferring proceeds of sale to the trustees of the proposed settlement, would amount to an application within the meaning of that word as used in section 53 of the Trustee Act, 1925; but then it is said it is not a single transaction which is involved, but two transactions; or, alternatively, a transaction having two distinct parts. There is, first of all, a sale, and that is the transaction, or part of the transaction; and, secondly, there is the application of the proceeds of sale to the trustees of the proposed settlement.

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[12] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.

Mr. Goulding has put forward the argument that it is the sale of the reversion alone which produces the benefit to the infant; namely, freedom from liability to what otherwise would be heavy estate duty, and that the application of moneys by settlement is something which is not of benefit to the infant; and, further, he says this, that it is the application which must be beneficial and which alone can justify the sale.

I agree with Mr. Goulding that if the proper way of looking at the section and at the proposed transaction is to say that two separate transactions are involved, or, alternatively, that there is a transaction in which two steps are to be taken, it must be, at any rate, apparent for the purpose of saying aye or no is what is proposed to be done with a view to the application of the capital or income thereof for the maintenance, or education, or benefit of the infant, though I have no jurisdiction; but if, on the other hand, the proposed transaction can be regarded as a single transaction, the component parts of which ought not to be regarded separately for the purpose of seeing what the impact thereon of the opening language of section 53 of the Trustee Act, 1925, is, then it appears to me I should be justified in saying that, there being, admittedly, an application, this is a case in which the language " with a view to the application " in section 53 is satisfied. I entirely accept that in this case the proposed settlement is not introduced in any way as a colourable transaction. It is an absolutely essential part of the transaction looked at as a whole, for no court would consider, in view of the limitations of the testator's will, that it would be fair to those whose interests come after that of the first defendant, merely to bar the entail and sell the property without making provision for their interests. The importance of that consideration, to my mind, is that it leads me, I find, inevitably to the conclusion that what I am dealing with here is one single transaction which I am not entitled to cut up in separate pieces for the purpose such as is suggested by Mr. Goulding. When looked at as one transaction, there can be no doubt whatsoever that the transaction is one of which it may be postulated that it is overwhelmingly in favour of the first defendant and, indeed, the other defendants whom Mr. Templeman represents, and on whose behalf he addressed me, and I come, therefore, to the conclusion that, for the reasons which I have given, this case is distinguishable from

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the case of *In re Heyworth's Contingent Reversionary Interest*,[13] and that the court has jurisdiction to approve a transaction on the lines indicated in the question and involving a settlement on the lines of the Exhibit to which I have referred. All I can do today, of course, is to decide the question of jurisdiction, which I have done, and the form of the transaction; the details of the settlement will have to be dealt with in chambers.

Declaration and order accordingly.

Solicitors: *Neish, Howell & Haldane; Speechly, Mumford & Craig.*

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[13] [1956] Ch. 364.

C. A.

1957
May 15, 16, 17.

Jenkins, Romer and Sellers L.JJ.

In re EDWARDS, DECD.
MACADAM *v.* WRIGHT AND OTHERS.

[1955 E. 344.]

Will—Election—Disposition after will—Disposition by will of freehold property and residuary estate to seven beneficiaries—Subsequent effective contract to devise freehold property to one beneficiary—Whether specific devise adeemed—Whether beneficiary required to elect—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 24.

A testatrix by her will dated February 8, 1952, directed that a freehold property known as No. 78, Albion Road, Hounslow, together with her residuary realty and personalty, should be divided between seven named persons, including the first defendant, W. In May, 1952, by an oral agreement, the testatrix promised, inter alia, to devise No. 78, Albion Road, to W. by her will in consideration of W. agreeing to reside with the testatrix and perform certain household duties for her. In pursuance of this agreement W. went to live with the testatrix from June 1, 1952, until the testatrix died on July 30, 1952. On September 20, 1952, the testatrix's will was proved by her executor, and by an order of Danckwerts J. made on October 2, 1953, the oral agreement was declared to be a binding contract between the testatrix and W. Accordingly, No. 78, Albion Road, was conveyed to W.

The executor took out a summons before Upjohn J. to determine whether W. was bound to elect between the one-seventh share of the property, No. 78, Albion Road, together with the testatrix's

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

residuary estate bequeathed to her by the said will, and the said property; or whether she was entitled to take both. Upjohn J. held that W. was bound to elect. W. appealed:—

Held, that W. was not bound to elect, and that, in the events which had happened after the making of the will, the specific devise had been adeemed, and no question of election arose. The testatrix could not be said to have manifested an intention to devise No. 78, Albion Road, since she had in effect disposed of it in her lifetime. ✓

Cooper v. *Cooper* (1874) L.R. 7 H.L. 53 distinguished.

Decision of Upjohn J. [1957] Ch. 21; [1956] 3 All E.R. 526 reversed.

Appeal from Upjohn J.

By her will dated February 8, 1952, Henrietta Phoebe Edwards, the testatrix, after appointing the plaintiff Thomas Sebastian Macadam to be her executor, and after making certain specific and pecuniary bequests, directed that: "78, Albion "Road, Hounslow, and the remainder of my estate and effects "real and personal of which I may die possessed be sold and the "proceeds divided equally amongst the following relatives who "may survive me." The testatrix then named seven beneficiaries, Elsie Mary Wright (her sister and the first defendant), Isaac James Ravenhill, Arthur Donald Ravenhill, Sydney Harold Ravenhill, Reginald Alfred Ravenhill, Helen Ravenhill, and Henrietta Ravenhill, who died on May 5, 1954, and whose personal representative was the said Sydney Harold Ravenhill.

In or about May, 1952, the testatrix and the first defendant entered into a contract concerning 78, Albion Road, the effect of which was that in consideration of the first defendant giving up the tenancy of the house in which she then lived and going to reside with the testatrix at 78, Albion Road, and undertaking certain duties towards the testatrix and performing the work of looking after the house, the testatrix would allow her to occupy two rooms in the house rent free during the joint lives of her and the testatrix, and the testatrix would devise the house by will to her absolutely at her death. On June 1, 1952, in pursuance of the agreement, the first defendant went into occupation of the two rooms and carried out her part of the bargain until the testatrix died on July 30, 1952. Her will was proved by the executor therein named out of the Principal Probate Registry on September 20, 1952, but a codicil thereto, by which the testatrix had attempted to devise No. 78, Albion Road, to the first defendant, did not comply with the provisions of the Wills Act, 1837, and was not admitted to probate.

The first defendant then brought an action against the executor for specific performance of the contract, and Danckwerts J. upheld the contract as valid and binding. The material part of his order read as follows: "This court doth declare that "there was a valid and binding contract whereby Henrietta "Phoebe Edwards deceased agreed to devise to the plaintiff the "dwelling-house, yard, garages, outbuildings and premises "situate and known as No. 78, Albion Road, Hounslow, in the "county of Middlesex in the pleadings mentioned. And this "court doth declare that the defendant as executor of the will "of the said Henrietta Phoebe Edwards holds the said property "on trust for the plaintiff absolutely. And this court do order "that the defendant do forthwith convey the said property to "the plaintiff."

Consequent upon this order the beneficiaries other than the first defendant claimed that the doctrine of election applied, on the ground that at the date of the testatrix's death No. 78, Albion Road, did not in fact belong to the testatrix, yet she, by her will, manifested an intention to leave that property on trust for sale and division, and inasmuch as the first defendant, the true owner of the property, was entitled to certain benefits under the will, all the elements necessary to make out a case for election were present.

On a summons taken out by the executor to determine whether, having regard to the disposition of No. 78, Albion Road, contained in the testatrix's will, the first defendant was bound to elect between the one-seventh share of residue together with the said property bequeathed to her by the will, and the said property, or whether she was entitled to both the said property and her full share of the residuary estate, Upjohn J. held that she was bound to elect, since there had been a disposition of her property and she had also received other benefits under the will. He held also that it made no difference whether or not the will or other act of disposition came first, since by virtue of section 24 of the Wills Act, 1837, the will spoke of the property comprised in it at the death.

The first defendant appealed.

S. W. Templeman for the first defendant. No testator can intend at the date of his death to dispose of property which he has sold since the date of his will. If the equitable doctrine of election applies to property which a beneficiary has purchased from the testator since the date of the will, the beneficiary will in effect pay twice over for the property, the intention of the testator will be frustrated and an equitable doctrine will produce a plainly inequitable result. *Cooper* v. *Cooper*[1] is distinguishable because in that case no question of ademption arose. In the present case the gift of the property was revoked by ademption and section 24 of the Wills Act, 1837, therefore does not apply. If section 24 of the Wills Act does apply, there is a contrary intention shown in that the testatrix having disposed of the property after the date of her will cannot have intended to dispose of the property at her death. For the purpose of considering whether the doctrine of election applies, the circumstances at and since the date of the will must be considered as in the case of the doctrine against double portions: *In re Wells*,[2] *In re Harris*[3] and *In re Gibson*.[4] There are only two classes of cases to which the doctrine of election applies, (1) where there is an expressed deliberate intention that it shall apply, and (2) where there is a mistake by the testator at the date of the will as to ownership.

Timothy Jones for the remaining beneficiaries. Election requires three circumstances: (1) The testator's intention, expressed in the will, to dispose of certain property. (2) The fact that that property belongs to another. (3) Benefits must be conferred by the will on that other. [Reference was made to Jarman on Wills, 8th ed., pp. 545 and 546, and to *Cooper* v. *Cooper*.[5]] As to (1), the testatrix clearly disposes of the property in question by her will; as to (2), it is sufficient if the beneficiary becomes entitled to the property only at or in consequence of the death of the testatrix; as to (3), there is no doubt, having regard to the will itself. To ascertain what is the testatrix's intention as expressed in the whole will, only the documents admitted to probate may be consulted; ademption in this case is therefore irrelevant. The testatrix's state of knowledge, and matters subsequent which show that state of knowledge, are also irrelevant: *Welby* v. *Welby*.[6] It has been contended that a disposition subsequent to the making of the will revokes the subject-matter of the gift concerned. Before the Wills Act, 1837, an alteration of estate revoked a devise, but by section 23 of that Act the doctrine was altered. Revocation could only be effected by marriage (section 18) or by writing or by destruction of the will (section 20). This, however, left unaffected the rule that a specific devise or gift was adeemed if it was wholly disposed of.

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[1] (1874) L.R. 7 H.L. 53.
[2] (1889) 42 Ch.D. 646.
[3] [1909] 2 Ch. 206.
[4] (1866) L.R. 2 Eq. 669.
[5] L.R. 7 H.L. 53.
[6] (1813) 2 V. & B. 187.

Some authorities speak of this as a "revocation" (see *Moor* v. *Raisbeck*[7]), but this is criticized in *In re Clowes*.[8] The ratio of cases where the testator sells the subject-matter of a specific devise and is left with a mortgage for the purchase price, or a lien for the unpaid price under an uncompleted contract, is that what he has purported to give has wholly gone. In this connexion see also *Farrar* v. *Lord Winterton*.[9] Authorities also speak of this as "ademption": *Gale* v. *Gale*[10]; *In re Galway*.[11] It follows that "revocation" is used in two senses, (i) revocation contemplated by the Wills Act, which determines what documents are admitted to probate, (ii) more widely, including an act by which a gift is adeemed, and so fails to take effect. Ademption is not, however, a question of intention: *Stanley* v. *Potter*[12]; *In re Slater*.[13] The first defendant was bound to elect.

Raymond Walton for the plaintiff.

JENKINS L.J. stated the facts and continued: The evidence shows as regards the figures that the only course open to the first defendant on the footing that she was put to her election was to keep the property and give up her one-seventh share of the residuary estate. The house is estimated to be worth £2,000, whereas the residue amounts to £5,750. Clearly it was in the first defendant's interest to take against rather than under the will, and, indeed, it would seem that if the doctrine of election applied at all the first defendant by bringing the action to enforce the contract did in fact elect against the will.

For the general principles relating to the doctrine of election we were referred to a passage at p. 558 of Halsbury's Laws of England, 3rd ed., vol. 14, para. 1091, headed "The doctrine of "election." "Where a testator by his will purports to give "property to A which in fact belongs to B, and at the same time "out of his own property confers benefits on B, the literal con- "struction and application of the will would allow B to keep his "own property to the disappointment of A, and also to take the "benefits given to him by the will. Equity, however, in such "circumstances, introduces the principle that a man shall not "accept and reject the same instrument, and B is not allowed "to take the full benefit given him by the will unless he is pre- "pared to carry into effect the whole of the testator's dispositions.

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[7] (1841) 12 Sim. 123.
[8] [1893] 1 Ch. 214, 218.
[9] (1842) 5 Beav. 1.
[10] (1856) 21 Beav. 349.
[11] [1950] Ch. 1.
[12] (1789) 2 Cox 180.
[13] [1907] 1 Ch. 665.

"He is accordingly put to his election to take either under the "instrument or against it. If he elects to take under the will he "is bound, and may be ordered, to convey his own property to "A; if he elects to take against the will and to keep his own "property, and so disappoints A, then he cannot take any benefits "under the will without compensating A out of such benefits "to the extent of the value of the property of which A is "disappointed."

We were also referred to certain passages in Jarman on Wills, 8th ed., vol. 1, pp. 545 and 546. On p. 545 the learned author says: "The doctrine of election, may be thus stated: That he who "accepts a benefit under a deed or will, must adopt the whole "contents of the instrument, conforming to all its provisions, "and renouncing every right inconsistent with it. If, therefore, "a testator has affected to dispose of property which is not his "own, and has given a benefit to the person to whom that "property belongs, the devisee or legatee accepting the benefit "so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his "proprietary rights against the testator's disposition, equity will "sequester the property given to him, for the purpose of making "satisfaction out of it to the person whom he has disappointed "by the assertion of those rights."

Then on p. 546 there is a passage particularly relied upon by the respondents in this case: "It must, however, be understood "that the obligation attaches on whoever at the testator's death "is true owner of the property wrongfully disposed of, and to "whom also a benefit is given by the will. This is the point of "time to be regarded. And it matters not from whom, or by "what previous acts or devolutions, such owner's title was "derived."

We were referred also to certain passages in *Cooper* v. *Cooper*,[1] where Lord Cairns said[2]: "The rule, as was said during the "argument at the bar, does not proceed either upon an expressed "intention, or upon a conjecture of presumed intention, but it "proceeds on a rule of equity founded upon the highest principles "of equity, and as to which the court does not occupy itself in "finding out whether the rule was present or was not present to "the mind of the party making the will."

Lord Hatherley said this[3]: "My Lords, the fallacy of that is "quite obvious. The condition, or rather obligation (which is the

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[1] (1874) L.R. 7 H.L. 53.

[2] Ibid. 67.

[3] Ibid. 70.

"expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law "imposes on a person claiming under an instrument, of giving full "effect to it, as far as it would be otherwise ineffective, except "through his concurrence, is simply this,—the law inquires on the "death of the testator, when the will comes into operation, what "is his intention, as expressed on the whole will, with reference "to the disposition of that which he considers to be his property; "and it being found clearly and distinctly (for it must be clearly "and distinctly found) that he has expressed his intention of "disposing of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies, "with regard to his intention, beyond the ordinary intent implied "in every man who affects by a legal instrument to dispose of "property, that he intends all that he has expressed, and, among "other things, that he intends to dispose of property as to which "he has so expressed an intention, though it really does not "belong to him. When once that intention is ascertained there is "nothing else remaining to be done, with reference to election, "than to see who is in possession and who is the real owner of "the property; and if you find him, who is the real owner of "the property at the same time taking a benefit under the will "which has erroneously endeavoured to dispose of his property, "then he must give effect to that intention, though founded in "error, and give it full effect by either abandoning all his interest "under the will, or making compensation to the extent of the "value of the disappointed intention of the testator."

In the last of the passages from *Cooper* v. *Cooper*[4] to which I need refer Lord Moncreiff said this[5]: "Then, my Lords, beyond "that there seems to be no question of intention raised. Every "testator intends that his will shall take full effect, and anything "that prevents the will from being wholly effectual of course "frustrates the intention of the testator to that extent. I cannot "concur in the view that was very ably and ingeniously argued, "that when it is said it is a question of intention, the meaning is, "that the testator must have intended that the legatee, if he "challenge or defeat any part of the will, shall be put to his "election. That is clearly not so, because that would exclude "from the operation of the principle every case in which a "testator supposed that he had full power over the property "which he professed and attempted to convey. That is contrary "to all the authorities. It is quite fixed, I think, that it is wholly

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[4] L.R. 7 H.L. 53.

[5] Ibid. 78.

"immaterial whether the testator thought that he had the power "to convey the property, or knowing that he had not the power, "usurped it. The rule in regard to election is in either case "precisely the same."

I would add a reference to *In re Harris.*[6] The facts of that case were widely different from those in the present appeal, but I cite it for this passage[7] bearing upon the question whether in a case of this kind, for the purpose of determining a claim that there is a case for election, it is not permissible to look at the facts and circumstances existing at the date of the will. "The more "reasonable time to take for the purpose of a test would, it seems "to me, be immediately before the date of her will, and if in the "present case she had acquired the property in question imme"diately before the date of the will, it would undoubtedly have "passed by her will." As appears from these authorities, the essentials of election are that there should be an intention on the part of the testator or testatrix to dispose of certain property; secondly, that the property should not in fact be the testator's or testatrix's own property; and, thirdly, that a benefit should be given by the will to the true owner of the property.

The reasoning upon which the judgment of Upjohn J. proceeded to the effect that a case for election did arise, is of this nature. First, the will speaks from the death of the testatrix under the provisions of the Wills Act, 1837, s. 24. Secondly, by the express terms of her will, looked at as at the date of her death, the testatrix did dispose of property, that is to say, No. 78, Albion Road, Hounslow. Thirdly, at the date of the testatrix's death, 78, Albion Road, was not her property, for she had disposed of it in favour of the first defendant in the way I have stated. Finally, a benefit was given to the true owner of the property under the will, that is to say, the first defendant, in the shape of her interest in the residuary estate. On this line of reasoning the judge concluded that a case for election was made out.

But none of the authorities to which I have referred deals with the special features of this case, that at the date of the will 78, Albion Road was the testatrix's property; that the will contained a plain, specific, devise of that property for sale and division among the settled and named individuals as the testatrix's own property; that between the date of the will and the date of the death the testatrix entered into the agreement for valuable consideration with respect to 78, Albion Road, of which specific performance was directed by Danckwerts J.'s order of October 2, 1953, the effect of which was that at the time of her death the testatrix was a bare trustee of the property for the first defendant, and consequently that by the time of the testatrix's death the gift of 78, Albion Road, contained in the will had been adeemed.

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[6] [1909] 2 Ch. 206.

[7] Ibid. 217.

The nature and effect of ademption is thus described in Jarman on Wills, 8th ed., vol. 2, pp. 1136 and 1137. On p. 1136 it is said: "The word ademption (from the Latin adimere) implies "that the legacy has been taken away. Thus there are two "kinds of ademption: the one where the testator gives a specific "chattel or fund, and the legacy fails because the chattel or fund "has ceased to be part of the testator's assets; the other, where "the testator gives a general legacy, and the legacy is held not "to be payable because the intended bounty has already been "satisfied by the testator: that is, there is an implied revocation "of the gift of the legacy." Then, lower down on p. 1136, it states: "Lord Romilly, in *Lord Chichester* v. *Coventry*,[8] has thus "explained the distinction between ademption and satisfaction: "'In ademption the former benefit is given by a will which is a "'revocable instrument, and which the testator can alter as he "'pleases, and consequently, when he gives benefits by deed "'subsequently to the will, he may, either by express words or "'by implication of law, substitute a second gift for the former, "'which he has the power of altering at his pleasure. Conse"'quently, in this case the law uses the word ademption because "'the bequest or devise contained in the will is thereby adeemed; "'that is, taken out of the will.'"

The result in the present case appears to me to be that at the date of the testatrix's death her will contained no effective gift to anyone of 78, Albion Road, and that the gift of the property which the will did contain was ineffective, not because the property did not belong to the testatrix at the time when she made her will, but because the gift of it as her own property which the will did contain was, in effect, revoked by ademption, by reason of the disposition of the property in favour of the first defendant made by the testatrix between the date of her will and the date of her death. Thus no intention to make any testamentary disposition of 78, Albion Road, can be imputed to the testatrix at the time of her death on the strength of the gift of it expressed in the will, because that gift, the only testamentary gift of it she ever made, was by that time adeemed, and therefore wholly inoperative, by reason of the subsequent disposition inter vivos in favour of the first defendant, and it follows that the first of the three conditions necessary to raise a case of election was not fulfilled.

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[8] (1867) L.R. 2 H.L. 71.

I can see no justification for resuscitating a testamentary gift of property which has been adeemed by a disposition inter vivos, and treating it as a fresh testamentary gift of property belonging to the person in whose favour the disposition inter vivos was made. The true position in such a case is, as it seems to me, that the testamentary disposition has clean gone, and the person in whose favour the disposition of the property inter vivos is made simply takes it under that disposition without any question of his or her thereby taking against the will, and thus being disqualified from receiving any benefit under the will.

The judge's conclusion to the contrary is, as I have already indicated, based largely, if not entirely, on section 24 of the Wills Act, because in the concluding paragraph of his judgment he says this [9]: "I return to the principle which I need not restate. Here "we have a will which, by virtue of section 24 of the Wills Act, "1837, speaks of the property comprised in it at the death. By "that will the testatrix has expressed the clearest possible intention to dispose of No. 78, Albion Road. Accordingly, applying "the principle, if the sister, Mrs. Wright, desires to accept a "benefit in respect of some quite different property under that "will, she must be prepared to adopt the whole contents of the "instrument, conform to all its provisions, and renounce every "right inconsistent with them. In my judgment, the speech of "Lord Hatherley, which I have already quoted, makes it quite "clear that the question whether the will or other act or disposition comes first, does not matter in the least degree. Since "the Wills Act, 1837, one has only to find the disposition of the "property of another who receives other benefits under the will. "Accordingly, I must declare that the defendant, Elsie Mary "Wright, is bound to elect between the property, No. 78, Albion "Road, and the residue of the estate and did so elect by obtaining judgment in the action."

I find it impossible to accept the proposition that the question whether a case of election has been raised is to be resolved solely and exclusively by reading the will of the testator or testatrix simply with reference to the facts as they existed at the date of the death, or, rather, I should say simply by reference to the facts indicated merely by a reading of the will as at the date of death. I further find it impossible to accept the proposition that, where it is material to ascertain whether a gift has been adeemed, section 24 of the Wills Act precludes investigation of the circumstances obtaining at the date of the will containing the gift in question, or of any matters which have occurred between the date of the will and the date of the death of the testator or testatrix bearing on the question whether the gift has been adeemed or not. If that were so, I find it difficult to see how any case of ademption could ever be made out. The essence of ademption surely is that there should have been a gift by will of property belonging to the testator or testatrix at the date of the will, followed by some dealing inter vivos with the property inconsistent with the testamentary gift. I think that *In re Gibson* [10] makes it sufficiently plain that section 24 of the Wills Act has no such effect.

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[9] [1957] Ch. 21, 27; [1956] 3 All E.R. 526, 530.

The argument for the respondents in the present case that where election is in question it is only permissible to look at the terms of the will as at the death of the testator or testatrix, and see whether it contains a purported gift of property belonging at the date of the death to some other person and confers a benefit on that other person, without regard to the circumstances in which the gift was made, or to any dealings with the subject-matter of the gift between the date of the will and the date of the death, might, if pressed to its logical conclusion, produce extraordinary and wholly inequitable results. Suppose in the present case that the testatrix, after making her will leaving 78, Albion Road, on trust for sale and division, had sold the property to the first defendant for its full value in cash but had not altered her will so as expressly to revoke the devise, Mr. Jones admitted that, according to his argument, it must follow that the first defendant would even then be put to her election either to keep the house, for which she had paid full value, and be excluded from participation in the residuary estate, including the purchase money by which she had herself increased it, or to surrender the house and be content with her fractional proportion of the residue, swollen by the value of the house and the purchase money she herself had paid for it. I would be sorry to think that what is supposed to be an equitable principle could operate to produce such an inequitable result. For the reasons which I have endeavoured to state I would allow this appeal.

ROMER L.J. I agree. In the events which happened it appears to me that this is in substance a case of the ademption of a specific devise. The testatrix owned No. 78, Albion Road, Hounslow, when she made her will, and was consequently able to dispose of it, which in fact she did. By the time she died, however, she had parted with the whole beneficial interest in the property to the first defendant. There was, therefore, no beneficial interest on which the gift in the will could operate, and it was for all material purposes as though the gift had been struck out of the will. That being so, it is impossible to attribute to the testatrix at her death an intention at that time, as distinct from the time when she made her will, to give the property to the seven beneficiaries, for to her own knowledge it was no longer hers to give. The importance of that point is that an intention to give the property must be shown to exist at the death before any question of election enters into the picture at all. That, I think, is shown by the authorities, an example of which is the decision of Parker J. in *In re Harris*,[11] to which my Lord has already referred. As the ademption of the subject-matter of the devise of necessity displaced any possibility of such an intention existing at the time of the testatrix's death, I am of opinion that the first defendant was free from any obligation to elect.

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[10] (1866) L.R. 2 Eq. 669.

Mr. Jones, in the course of his argument for the other beneficiaries, said that if one finds three elements in conjunction the principle or doctrine of election automatically applies. They are, first, that a testator has expressed an intention in his will to dispose of certain property; secondly, that in fact that property at or immediately after the testator's death belongs to another; and, thirdly, that the will confers benefits on the owner of that property. Mr. Jones' submission was that, if those three elements are present, the principle applies; and that the testator's intention in relation to the property at his death can only be ascertained from the language of the will, and that in the present case the language of the testatrix's will, that is to say, Mrs. Edwards' will, shows a clear intention to dispose of No. 78, Albion Road. Mr. Jones says that no events which occurred between the date of the will and the date of the death can be looked to for the purpose of seeing whether the principle of election applies or not or as to what the testatrix's intention with regard to devising the property was when she died. In support of that contention he relied on the observations of Lord Hatherley in *Cooper* v. *Cooper*,[12] which were cited by Upjohn J. in his judgment and which have been read by my Lord in the course of his judgment.

[11] [1909] 2 Ch. 206.

[12] L.R. 7 H.L. 53.

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EDWARDS, DECD., *In re.*

Romer L.J.

I cannot accept that submission, and I do not think that Lord Hatherley's observations were at all directed to cases such as the present. The circumstances of *Cooper* v. *Cooper*[12] were different in one vital respect from the present, namely, that at the date of the will the ordinary elements of election were present, whereas in the present case the testatrix has disposed of the property to the first defendant for value after the will, and the property had accordingly disappeared and ceased to form any part of the testatrix's assets at the date of her death.

But in applying the law as to ademption the court of necessity has to look, and does look, to events which have taken place subsequent to the will. So also in applying the law relating to double portions: if the court finds that a portion to a child has been given inter vivos after the will it will treat that gift as a satisfaction either in whole or in part of a portion given by the will. So, similarly, in my opinion, when the question is whether the principle of election should be applied or not. This principle has not the inflexible rigidity of a rule of law. The purpose of the rule is stated in the passage from Jarman, to which my Lord has already referred, in vol. 1, 8th ed., p. 545, and I will only read again one portion of it. Mr. Jarman says: "If, therefore, a "testator has affected to dispose of property which is not his own, "and has given a benefit to the person to whom the property "belongs, the devisee or legatee accepting the benefit so given to "him must make good the testator's attempted disposition; but "if, on the contrary, he choose to enforce his proprietary rights "against the testator's disposition, equity will sequester the "property given to him"—these are, I think, the important words—"for the purpose of making satisfaction out of it to the "person who he has disappointed by the assertion of those "rights."

On the respondents' argument in the present case the principle would apply even though there were no disappointed legatees to compensate. That is sufficiently shown by the hypothesis, to which my Lord referred in the course of his judgment, namely, that if the first defendant had in fact paid to the testatrix £2,000, which was the value of this house, for the house just before the testatrix's death, that money would have taken the place of the house, and therefore there would have been no diminution in the value of the assets which were to be shared by the legatees. Nevertheless, on the respondents' argument, the first defendant would still have been bound to elect, with the result that the other legatees would have had their shares greatly increased in amount at the first defendant's expense.

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[12] L.R. 7 H.L. 53.

For my part, I have no doubt but that the court would not in such a case as that apply the equitable doctrine of election to bring about such an inequitable result. If that be right, it follows that the principle will not be invariably applied merely because the three elements to which Mr. Jones referred are present; and it should not be applied here, in my judgment, where the first defendant is shown to have given valuable consideration for the house. I agree that the appeal should be allowed.

SELLERS L.J. I agree that the appeal should be allowed. On the facts of this case it would seem to me to be inequitable that election, an equitable doctrine, should be imposed upon the first defendant. No case has been cited where a testator has made a gift of property under his will which at the time it was made was his to give but who later disposed of the property for value to a beneficiary under the will in part in respect of the property in question and in part in respect of additional benefits. If no other answer could be given, the application of the doctrine in such circumstances would call for further consideration as a matter of equity. I agree with the observations which Romer L.J. has just made in that regard. But, in the events which happened after the making of the will, the gift of the property in question was adeemed and has in effect gone from the will, and no question of election arises. At the date of her death it cannot be said that the testatrix manifested an intention to leave 78, Albion Road, by her will. She had in effect sold it in her lifetime. I entirely agree with my Lords' reasons in their judgments.

Appeal allowed.

Solicitors: *Wylie Patterson & Herring for Charles Robinson & Son, Hounslow; Anthony Gane & Co.*

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Oct. 22;
Nov. 5.

1957
July 5, 9, 10,
11, 12, 16,
17, 18, 23.

Roxburgh J.

In re BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY).

[0097 of 1932.]

In re MOSCOW MERCHANTS' TRADING CO. LTD.

[00764 of 1956.]

Company—Winding up—Foreign corporation—Russian bank—Bank incorporated under Tsarist law as a company limited by shares—Bank an unregistered company in England—Dissolution in Russia by Soviet confiscatory decree—Compulsory winding up in England—Surplus assets in England—Whether Crown entitled to surplus assets as bona vacantia—Rights of former shareholders—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 211, 221 (1), 338 (1), 342—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 265, 274, 354.

Company—Winding up—Foreign corporation—Statute-barred debts—Russian trading company incorporated under Tsarist law—Cessation by virtue of Soviet law—Credit bank balance in England at date of cessation—Petition to wind up 33 years after date of cessation—Whether winding-up order to contain proviso protecting creditors with statute-barred debts.

In 1866 a bank was incorporated under the laws of Imperial Russia as a company limited by shares and carried on banking business until the revolution of 1917. In December, 1917, or not later than January 19, 1920, it was dissolved in Russia by the law of the U.S.S.R. by virtue of decrees of December, 1917, January, 1918, and January, 1920. In 1932 an order for its compulsory winding up was made under section 338 (1) (*d*) of the Companies Act, 1929, on a creditor's petition, in the Companies Court, in the Attorney-General's presence, the order containing the proviso then usual that the order be without prejudice to the Crown's claim to any of the company's assets which might have become bona vacantia. All proofs of debt were dealt with and it was uncertain whether the liquidator could, pursuant to the proviso in the winding-up order, pay over the surplus to the Crown. By this summons he asked whether the bank's surplus assets were distributable among its contributories in accordance with Part V of the Companies Act, 1948, or how otherwise.

Evidence was given that under Soviet law a limited company was dissolved on passing into liquidation, whereupon its assets were converted into the shareholders' common ownership, and that the bank's assets, in so far as not affected by the Soviet revolutionary legislation, were so converted, which position was unchanged by subsequent Soviet legislation. It was common ground that those decrees could not confiscate the bank's surplus assets in the winding up in England:—

Held, (1) that the reasoning by which an order for winding up a dissolved foreign corporation under the Companies Acts defeated the title of the Crown to assets as bona vacantia so far as might be necessary to pay former creditors necessarily embraced beneficiaries as well as creditors, for sections 211, 221 and 296 of the Companies Act, 1929 [1] (or the corresponding sections 265, 274 and 354 of the Companies Act, 1948), were no less mandatory than the provisions affecting creditors or persons so described; and that the reasoning displacing the Crown's claim to assets as bona vacantia could not be halted to the detriment of those entitled thereto unless the Crown was "the persons entitled thereto," but, on the true construction of the sections read together, it could not be held that "persons "entitled" meant the Crown by virtue of its prerogative right to bona vacantia.

(2) That the position could not be affected by the proviso in the winding-up order of 1932, since, by force of the statute itself, which was imperative, the Crown's title was postponed to the persons entitled to surplus assets, so that the court had a discretion as to the making of the order but not as to its operation when made.

Russian and English Bank v. *Baring Brothers & Co.* [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505 considered.

In re Azoff-Don Commercial Bank [1954] Ch. 315; [1954] 1 All E.R. 947 applied.

In re Banque Industrielle de Moscou [1952] Ch. 919; [1952] 2 T.L.R. 406; [1952] 2 All E.R. 532 not followed.

(3) That, since the bank was a Russian corporation, dissolved under Russian law, the Crown's title to the surplus assets as bona vacantia under section 274 of the Act of 1948 was excluded in favour

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[1] Companies Act, 1929, s. 211: "The court shall adjust the rights of "the contributories among themselves, "and distribute any surplus among "the persons entitled thereto."

S. 221 (1): "When the affairs of "a company have been completely "wound up, the court shall make an "order that the company be dissolved "from the date of the order, and "the company shall be dissolved "accordingly."

S. 296: "Where a company is dis"solved, all property and rights what"soever vested in or held on trust "for the company immediately before "its dissolution (including leasehold "property but not including property "held by the company on trust for "any other person) shall, subject and "without prejudice to any order which "may at any time be made by the "court under the two last foregoing "sections of this Act, be deemed to "be bona vacantia and shall accord"ingly belong to the Crown, or to the "Duchy of Lancaster or to the Duke "of Cornwall for the time being, as "the case may be, and shall vest and "may be dealt with in the same "manner as other bona vacantia "accruing to the Crown, to the Duchy "of Lancaster or to the Duke of "Cornwall."

S. 338 (1): "Subject to the provi"sions of this Part of this Act, any "unregistered company may be wound "up under this Act, and all the "provisions of this Act with respect "to winding up shall apply to an "unregistered company, with the "following exceptions and additions. ". . . (*d*) the circumstances under "which an unregistered company may "be wound up are as follows: (i) if "the company is dissolved . . ."

S. 342: "The provisions of this "Part of this Act with respect to "unregistered companies shall be in "addition to and not in restriction "of any provisions hereinbefore in "this Act contained with respect to "winding up companies by the court. ". . ."

of persons who could prove their title to those assets under Russian law.

(4) That, accordingly, as those assets were by English law unaffected by the Soviet legislation for the confiscation of the bank's assets, they were not at the present stage payable to the Crown as bona vacantia but should continue to be dealt with on the footing that on the bank's dissolution its former shareholders became entitled to participate in them.

In October, 1956, the liquidator presented a petition to wind up a trading company, which had been incorporated under the laws of Imperial Russia in 1915. Under a Soviet law of 1922 it ceased to exist juridically as from January 1, 1923. It had at that date a credit bank balance in the United Kingdom believed to exceed £10,000. The court adjourned the liquidator's petition to wind it up, for argument on the question whether, since there had been put in similar orders provisions considered to affect the Crown's position in relation to bona vacantia in such a winding up, it would be proper to put in the winding-up order a provision to protect creditors with statute-barred debts: and judgment on the petition was given immediately after that in the summons in the winding up of the bank:—

Held, that, as the court had just held that no such provision had any effect on the mandatory course of winding up as provided by statute, the winding-up order should be unqualified.

In re BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY).

SUMMONS IN A WINDING UP.

This was an application by Owen Furnival Furnival-Jones, the liquidator of Banque des Marchands de Moscou (Koupetschesky) (hereinafter called " the bank ") to determine (inter alia) whether the bank's surplus assets passed to the Crown as bona vacantia or were distributable among the bank's contributories.

The bank was incorporated in June, 1866, under the laws of Imperial Russia as a company limited by shares, its main object being that of an ordinary joint stock bank: and it carried on banking business down to the date of the revolution in 1917. In that year its capital, all issued and fully paid up, was 27 million roubles (approximately £2,700,000), divided into 1,000 shares of 12,000 roubles each and 2,500 shares of 6,000 roubles each. Some, but not all, were bearer shares. Probably on December 17, 1917, and certainly not later than January 19, 1920, the bank was dissolved in Russia by the law of the U.S.S.R. by virtue of (1) a decree, dated December 14, 1917, of the nationalization of the bank, (2) a decree, dated January 6, 1918, of the People's Commissaries and (3) a decree, dated January 19, 1920, of the Council of People's Commissaries.

On May 30, 1932, an order for the compulsory winding up of the bank under section 338 (1) (*d*) of the Companies Act, 1929, was made on a creditor's petition in the Companies Court, in the Attorney-General's presence. In the order was the provision, usual at that date: "and this order is without prejudice to the "claim of the Crown to any of the assets of the said company "which may have become bona vacantia." By two notices dated June 1, 1932, and addressed respectively to the senior official receiver as liquidator of the bank and to Midland Bank Ltd., the Treasury Solicitor claimed the bank's assets as bona vacantia.

By order dated September 1, 1938, the then liquidator was given leave to join in instituting proceedings in the Chancery Division in the joint names of the bank and the Attorney-General against Midland Bank Ltd., claiming (inter alia) an account of all moneys in the hands of Midland Bank Ltd., belonging to the bank and payment of the amount found due on the taking of the account. The proceedings were compromised by an agreement dated October 7, 1941, and made between the liquidator, the Attorney-General and Midland Bank Ltd., whereunder the liquidator received £352,500 in full and final settlement of all claims whatever to or in respect of all or any moneys due to the bank from Midland Bank Ltd. and for costs. For the effectuation of the compromise the Crown waived all its rights to that sum as bona vacantia as against the Midland Bank but, as a term of the Crown's consent to the compromise, the then liquidator, with the court's authority, admitted the claim of the Bank of England, representing the Treasury, for £287,500. All the proofs of debt against the bank submitted in the liquidation were dealt with and the claims totalled £311,719 17s. 1d. The liquidator estimated that, after discharge of all costs, charges and expenses, remuneration, Board of Trade fees and liabilities properly incurred by him as liquidator, there would be in his hands a sum which might amount to £50,000. He was advised that, in the light of recent decisions, it was uncertain whether he could safely act on the proviso to the winding-up order of May 30, 1932, by paying over the surplus to the Crown. Accordingly, by a summons in the liquidation dated December 7, 1955, he asked leave to pay the balance remaining in his hands to the Crown as bona vacantia or, alternatively, for directions what action to take with regard to its distribution. On January 23, 1956, Roxburgh J. ordered that he take out a summons to determine whether the balance ought to be distributed among the contributories or paid to the Crown.

Accordingly, by this summons, dated June 20, 1956, the liquidator asked whether the bank's surplus assets remaining after satisfying all its liabilities and the costs and expenses of the liquidation passed to the Crown as bona vacantia, were distributable among the bank's contributories in accordance with Part V of the Companies Act, 1948, or were distributable or applicable in some other and if so what manner: and he asked also that Marc Wilenkin be appointed to represent the contributories. The respondents to the summons were the Attorney-General, who claimed the surplus assets as bona vacantia, and Marc Wilenkin, the personal representative of three persons who, he claimed, were contributories, namely, George Czamanski, Boris Schwetzoff and Michail Bardiguine.

Evidence on affidavit and orally was given by Samuel Dobrin, a member of the Russian Bar in practice in Russia until the revolution of 1917 and legal adviser to Soviet organizations in the United Kingdom from 1925 until 1930. He stated that, in his opinion, on the bank's dissolution as a result of the Soviet revolutionary legislation, the bank's assets which were outside the ambit of that confiscatory legislation automatically came into and had ever since remained in the common ownership of the persons who immediately before the dissolution were the bank's shareholders. There was, he stated, no doctrine of bona vacantia in Russia in connexion with assets of a dissolved company. Under Soviet-Russian law the destruction of the bank as a legal entity by the Soviet revolutionary legislation resulted, not in making its assets bona vacantia, but in converting them into the common ownership of its late shareholders, which assets in the liquidator's hands had continued to be to the extent to which they were outside the ambit of the Soviet confiscatory decrees. (The bank's assets inside Russia were appropriated by the Soviet Government by confiscation.) Under Tsarist law, he continued, a limited company was dissolved and ceased to be a legal entity, not with the ending of its liquidation, but on its passing into liquidation. That loss of legal status resulted, not in the conversion of the company's assets into bona vacantia and their loss to the shareholders, but in their conversion into the late shareholders' common ownership. The surplus asset available for distribution in the present case being the residue of a fund in England which came into being as the result of the collection of a debt due to the bank from an English bank, the parties agreed that the Soviet decrees, in so far as they purported to confiscate that asset, would not be effective to confiscate it in England. The witness's conclusion was that, whichever date—1917, 1918 or 1920—was taken as the date of dissolution, the result was that the bank's assets, in so far as not effectively confiscated by the Soviet revolutionary legislation, were converted into the late shareholders' common ownership, which situation had remained unaffected by any subsequent Soviet legislation.

Peter Foster Q.C. and *Raymond Walton* for the liquidator.

R. O. Wilberforce Q.C. and *Denys Buckley* for the Attorney-General. The contributories or their personal representatives have no right to these surplus assets: *In re Banque Industrielle de Moscou.*[2] True it is that where, under either the Act of 1929 or that of 1948, a petition is presented to wind up a foreign corporation which has already been dissolved in the country of its incorporation, the order can be made even if the Crown opposes it, if there are still creditors to be paid; and, if it is made, the Crown is disentitled to the assets as bona vacantia until those creditors have been paid: *In re Azoff-Don Commercial Bank.*[3] That, however, is not the present case at all. Also, the proviso in the winding-up order of 1932 specifically safeguards the Crown's rights to assets as bona vacantia.

The majority opinion of the House of Lords in *Russian and English Bank* v. *Baring Brothers & Co.*[4] was that a company already dissolved in the country of its incorporation could be wound up in this country. Apparently there was in that case no citation of the Joint Stock Companies Winding-Up Act, 1848, which, in section 5, provides that a winding-up order can be made "if any company shall have been dissolved," and in section 34 that the company's assets are to be distributed among the parties entitled. In the present case the Crown comes within the words "the persons entitled thereto" in section 211 of the Act of 1929 and is entitled to these surplus assets.

Charles Russell Q.C. and *Michael Wheeler* for the contributories. The court should follow *In re Azoff-Don Commercial Bank* [5] and not *In re Banque Industrielle de Moscou,*[6] and should hold that the contributories or their personal representatives are entitled to these assets. On the true construction of sections 211, 221 and 296 of the Act of 1929 the Crown cannot come within the words "the persons entitled thereto" in section 211. The evidence, consisting solely of Dr. Dobrin's expert opinion, is entirely in the contributories' favour. The Crown has deliberately chosen not to call evidence to the contrary and so cannot ask the court to conclude that Dr. Dobrin is mistaken and therefore to construe the Russian decrees itself. So to do would be to "go far beyond the law and practice relating to the proof of "foreign law": *Buerger* v. *New York Life Assurance Co.*,[7] *per* Atkin L.J.

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[2] [1952] Ch. 919; [1952] 2 T.L.R. 406; [1952] 2 All E.R. 532.

[3] [1954] Ch. 315; [1954] 1 All E.R. 947.

[4] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[5] [1954] Ch. 315.

[6] [1952] Ch. 919.

Cur. adv. vult.

July 23. ROXBURGH J. The Banque des Marchands de Moscou (Koupetschesky) was incorporated in 1866 under the laws of Imperial Russia as a company limited by shares. It carried on banking business until, and it may be after, the Russian revolution.

Before May 30, 1932, the bank had been dissolved under Russian law. On that date a winding-up order was made in this court under section 338 (1) (*d*) of the Companies Act, 1929, upon the footing that the bank was an unregistered company which had been dissolved, and the order contained the following provision: "And this order is without prejudice to the claim of the "Crown to any of the assets of the said company which may "have become bona vacantia."

Section 338 (1) opened with the words: "Subject to the "provisions of this Part of this Act, any unregistered company "may be wound up under this Act, and all the provisions of "this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions ". . ." A number of exceptions and additions irrelevant to the present purpose followed, and section 342 enacted: "The provisions of this Part of this Act with respect to unregistered "companies shall be in addition to and not in restriction of any "provisions hereinbefore in this Act contained with respect to "winding up companies by the court . . ."

The sections particularly germane were section 211, which provided "The court shall adjust the rights of the contributories "among themselves and distribute any surplus among the "persons entitled thereto"; section 221 (1), which provided "When the affairs of a company have been completely wound "up, the court shall make an order that the company be dissolved "from the date of the order, and the company shall be dissolved "accordingly"; and section 296, which provided "Where a

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[7] (1927) 96 L.J.K.B. 930, 940.

"company is dissolved, all property and rights whatsoever vested "in or held on trust for the company immediately before its "dissolution (including leasehold property but not including "property held by the company on trust for any other person) "shall, subject and without prejudice to any order which may "at any time be made by the court under the two last foregoing "sections of this Act, be deemed to be bona vacantia, and shall "accordingly belong to the Crown, or to the Duchy of Lancaster "or to the Duke of Cornwall for the time being, as the case may "be, and shall vest and may be dealt with in the same manner "as other bona vacantia accruing to the Crown, to the Duchy "of Lancaster or to the Duke of Cornwall."

First of all, I shall deal with the question of bona vacantia without regard to the provision in the order dealing with that topic. I will then consider whether the special provision in the order has any effect.

The problem of applying the provisions of that Act with respect to the winding up of companies to a dissolved company produced divisions of opinion in the House of Lords: see *Russian and English Bank* v. *Baring Brothers & Co.*[1] For example, Lord Russell of Killowen (who was one of the dissentients) said[2]: "The application of section 338 to the case of a dissolved foreign "corporation is no doubt on any view of the present appeal full "of difficulties. Many of the provisions contained in Part V "cannot, if read strictly, apply to such a case. Thus, strictly "speaking, there could not be a petition presented by a creditor; "there are no creditors of a dissolved company. Nor could a "list of contributories be settled. Nor are there any assets of a "dissolved company." And again later[3]: "A Russian corpora-"tion . . . was dissolved and ceased to exist seventeen years "ago. The property which it owned in this country thereupon "became the property of the Crown. After the lapse of some "fourteen or fifteen years an order is made under section 338. "Upon the happening of that event, it is alleged, the Act . . . "enacts . . . that dissolved foreign corporations are to arise "from the grave in full life and vigour, and entitled to sue to "recover property which for fourteen or fifteen years has been "the property of the Crown; or that they are to be so entitled "notwithstanding that they do not exist. My Lords, I confess "frankly that I find myself unequal to the task of assenting to "this view."

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[1] [1936] A.C. 405.

[2] Ibid. 433.

[3] Ibid. 434.

1957

Banque des Marchands de Moscou (Koupetschesky), *In re.*

Moscow Merchants' Trading Co. Ltd., *In re.*

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Again, I cite an extract from the dissenting speech of Lord Maugham [4]: "It would seem clear that upon the dissolution "of the company according to Russian law its chattels in this "country, in the absence of any claim to them by the Russian "Government, belonged to the Crown as bona vacantia: see "*In re Higginson and Dean.*[5] Under section 296 (a new section "which first appeared in the Act of 1928) the same result would "follow, but subject and without prejudice to any order under "section 294 or section 295. Neither of those sections could be "invoked in the present case, and it would seem that unless the "Crown waives its claim to the assets in question (as in the case "of *In re Henderson's Nigel Co.*[6]), there will be no assets "available for distribution."

But these views did not commend themselves to the majority. I quote one passage from the speech of Lord Atkin [7]: "The "legislature has provided that a dissolved foreign corporation "may be wound up in accordance with the provisions of the "Companies Act. The provisions of the Companies Act as to "winding up are only applicable to corporations which are in "existence. Are we to say that the legislative enactment is "completely futile: or is there another solution? My Lords, "I think that we are entitled to imply, indeed I think it is a "necessary implication, that the dissolved foreign company is "to be wound up as though it had not been dissolved, and "therefore continued in existence.

"This seems to me with respect the necessary result of saying "that it shall be wound up in accordance with the provisions "of the Act. There is nothing abnormal in such a provision. "The municipal law of this country, as of other countries, accepts "the principle of international law that countries ordinarily "accept the existence of juristic persons brought into being or "recognized as existing in their country of origin. Similarly "they accept the destruction or cessation of such a juristic "personality under the law of its country of origin. But if the "municipal law choose it may in defined conditions refuse to "accept or may accept only under conditions either the creation "or destruction of a foreign juristic person: whether it has done "so is for the municipal courts to decide, but if it has, then the "municipal court must accept the situation. I see nothing "incongruous in the legislature saying in effect, we accept the

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[4] [1936] A.C. 405, 444.

[5] [1899] 1 Q.B. 325; 15 T.L.R. 135.

[6] (1911) 105 L.T. 370.

[7] [1936] A.C. 405, 427.

"existence of a foreign corporation coming to trade in this "country; we shall only impose a condition of registration. But "if the corporation does trade here, acquires assets here and "incurs debts here, we shall not accept its dissolution abroad "without a stipulation that if desirable it may be wound up here "so that its assets here shall be distributed amongst its creditors "(I do not stay to consider whether its English creditors or "creditors generally) and for the purpose of the winding up it "shall be deemed not to have been dissolved; for that event "would defeat our municipal provisions for winding up a corporation. This does not appear to me to be re-creating or "reconstituting a new corporation; it is for particular and limited "purposes refusing to recognize the dissolution of the old."

It is indeed strange that counsel did not in that case draw attention to the Joint Stock Companies Winding-Up Act, 1848 (11 & 12 Vict. c. 45). Had they done so, it is possible that the decision might have been unanimous, because it is clear that the procedure of treating a dissolved company as continuing in existence for the purpose of winding it up was well established and understood in England some hundred years ago, and although such confused notions seem to have been abandoned in connexion with English companies soon afterwards, the very similar provisions with regard to dissolved foreign corporations which were subsequently introduced seem to represent a deliberate revival of discarded notions.

One of the grounds for making a winding-up order under the Act of 1848 was "if any company shall have been dissolved": section 5. Among the duties of the official manager (under the directions of the master) was getting in, selling, and converting the estate and assets and winding up the business and affairs of the same company, in paying the debts (as therein provided) and in dividing and distributing the surplus assets of the company (whether existing at the time of the dissolution or arising from subsequent calls or contributions or otherwise) among the parties entitled: section 34. The sidenote to section 50 is: "Dissolved "companies to sue and be sued in the name of the 'official "'manager' of the particular company," and a form of order (No. 2) in the Schedule provides "His Lordship doth order that "the (blank) company be absolutely dissolved as from this day "(or from the (blank) day of (blank)) and wound up under the "provisions of the . . . Act."

From that Act I draw the following deductions: (1) That in 1848 Parliament saw no objection in principle or practice to dissolving a company before winding up its affairs. (2) That for this purpose it treated the dissolved company as continuing in existence. (3) That an order for winding up in the case of a dissolved company displaced the title of the Crown to assets as bona vacantia so far as was necessary for the payment of debts and the distribution of surplus assets among the "parties "entitled." I have not been referred to any case in which the Crown sought to interpose a claim to bona vacantia between creditors and former members.

This seems to have been likewise the scheme of the provisions which caused so much difficulty in the House of Lords. It is now well settled that an order for winding up a dissolved foreign corporation under the Act of 1929 or 1948 defeats the title of the Crown to assets as bona vacantia so far as may be necessary to pay former creditors, and may be made in face of opposition by the Crown: see *In re Azoff-Don Commercial Bank.*[8]

But why stop there? The reasoning of Wynn-Parry J. in that case necessarily embraces beneficiaries as well as creditors.[9] "Once it is shown, as in my view I have shown, that a section "in Part V of the Act cuts down the Crown's prerogative by "necessary implication, it follows that every other applicable "section of that part has the same operation if that result is "necessary to its effective working." With this I agree. Sections 338 and 342 of the Act of 1929 and the corresponding sections 399 and 404 of the Act of 1948 provide that if an order to wind up a dissolved company is made, certain other sections, including sections 211, 221 and 296 of the Act of 1929 (or the corresponding sections 265, 274 and 354 of the Act of 1948) shall apply. These provisions are no less mandatory than those affecting creditors, or persons described as creditors, and the reasoning which displaces the Crown's original claim to assets as bona vacantia cannot be halted to the detriment of the parties entitled thereto unless it could be said that in the circumstances the Crown is "the persons entitled thereto." But if sections 211, 221 and 296 of the Act of 1929 or sections 265, 274 and 354 of the Act of 1948 are read together, it is in my judgment impossible to hold that the phrase "persons entitled" means the Crown by virtue of its prerogative right to bona vacantia.

It is true that in the earlier case of *In re Banque Industrielle de Moscou*[10] Wynn-Parry J. said: ". . . in a case such as this "where the company has been dissolved, and dissolved so long

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[8] [1954] Ch. 315.

[9] Ibid. 325.

[10] [1952] Ch. 919, 923.

"ago under the laws of the country of its incorporation, there "can, of course, be no question of the rights of contributories." But I prefer his reasoning in the later case, and no argument has been addressed to me on the basis that the lapse of time is relevant.

This reasoning seems also to exclude the possibility that the special condition inserted in the order can affect the position. The court has a discretion in relation to the making of an order, but none as to its operation when made. By force of the statute itself, which is imperative, the title of the Crown is postponed to the persons entitled to surplus assets. In the above cited case of *In re Banque Industrielle de Moscou*[11] Wynn-Parry J construed a provision of this sort on the footing that it was effective, but no argument to the contrary seems to have been addressed to him.

But, of course, the Crown's title to assets as bona vacantia is only excluded in favour of persons who can prove their title to surplus assets. If the valid claims do not exhaust them, section 274 of the Act of 1948 will be put in operation in favour of the Crown. And as this was a Russian corporation, which had been dissolved under Russian law, title must be made under the same law.

Russian law is in an English court a question of fact, and the normal course, when there is a dispute as to foreign law, is for each side to call experts, who usually differ. Then the judge has the comparatively easy task of choosing between them. In this case, however, the Crown elected to call no evidence, and to decline my invitation to do so, and contented itself with an extensive and able cross-examination of the expert called on behalf of the personal representative of a deceased Russian former shareholder, as a substitute for evidence.

The risks involved in such a course are well illustrated by *Buerger* v. *New York Life Assurance Co.*[12] in the Court of Appeal, in which a similar situation occurred. In the course of his judgment Atkin L.J. said[13]: "Now this being the uncontra-"dicted evidence of a Russian lawyer, and the Russian Depart-"ment of Justice, as to what the law is in Russia today, the "defendants, without calling any evidence, ask us to say that "the lawyer and the department are mistaken; that the Russian "law is something different and that the law in Russia really is "that Russian subjects cannot claim against foreign insurance

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[11] [1952] Ch. 919.
[12] (1927) 96 L.J.K.B. 930.
[13] Ibid. 940.

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"companies. They say that we are bound to come to this "conclusion on the interpretation of the decree of November 18, "1919, on which we are to put our own construction. Such a "result would appear to me to go far beyond the law and practice "relating to the proof of foreign law. It is not sufficient to prove "a foreign statute or code by a translation, and then leave the "court to place its own construction on it. The code must be "interpreted by an expert in the foreign law. It is, of course, "true that when he vouches a statute to support his evidence "the statute forms part of his evidence, and must be considered "in the consideration of his evidence as a whole. And it is "also true that where experts on the foreign law differ amongst "themselves the court will often have to resolve the conflict by "looking at the statutes or documents and deciding for themselves the more probable contention. And this course will be "more readily undertaken where the dispute is as to the effect of "legislation, as in the United States of America, expressed in "English in respect of a jurisprudence which is known to the "English judges. And it may also happen occasionally that a "foreign expert may arrive at results so extravagant and involving such a misunderstanding of conceptions familiar to lawyers "of all countries that an English court may have to reject his "evidence, and eventually come to the conclusion that they can "safely interpret the words for themselves, or fall back upon "the presumption that the proper methods of construction "coincide with the English. But in the first instance the "English courts must rely on the evidence of competent foreign "lawyers."

Bankes and Atkin L.JJ. accepted the Russian expert evidence accordingly. Scrutton L.J. dissented on the ground that he could see no reason [14] why a court is bound to accept the "evidence of an expert witness as to fact, when he supports it "by a document the plain words of which render his opinion "impossible."

In the present case, the cross-examination of Dr. Dobrin has satisfied me that he is an entirely truthful witness who firmly believes in the evidence which he has given, and who stood up to questions from counsel and me with remarkable understanding, resourcefulness and consistency. It is true that some of his conclusions cause me surprise, but am I entitled to prefer my views to his? Am I better qualified to expound Russian law than he is?

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[14] 96 L.J.K.B. 930, 937.

The first question to which he addressed his evidence was the position of former shareholders on the dissolution of the bank, apart altogether from the Soviet decrees. He said this in his affidavit (paragraph 7). "Under Tsarist law, a limited company "was dissolved and ceased to be a legal entity, not with the "ending of its liquidation but on its passing into liquidation. "For such a company to go into liquidation meant that it ceased "to be a legal entity. This loss of legal status did not involve "the conversion of the company's assets into bona vacantia and "their loss to the shareholders. Fundamentally it resulted in "the conversion of the assets into the common ownership of "the late shareholders, subject to the payment of debts." So far his evidence appears to be undoubtedly right. The position in Russia was not dissimilar to that in England before the Crimean War, and company law evolved slowly in Russia.

But the difficulty begins with the Soviet decrees. The surplus asset available for distribution is the residue of a fund in England resulting from the collection of a debt due from an English bank to the dissolved bank, and it is common ground that, in so far as the Soviet decrees purported to confiscate that asset, they would not be effective for that purpose in England. This is crucial, and lies at the root of Dr. Dobrin's reasoning.

He states his conclusions as follows in paragraph 16: "I now "turn to the effect of the Soviet revolutionary legislation on the "existence of the bank as a legal entity. This legislation, which "commenced, so far as the bank is concerned, with the 'Decree "'of the Nationalization of Banking' passed on December 14, "1917 (hereinafter called 'the Decree of 1917') provides an "example where the peculiar meaning and incidents in Tsarist "law of the dissolution of a limited company are of practical "significance. In considering the effect of the Soviet legislation, "it is important to bear in mind its general underlying technique, "intentional or unintentional; the legislation made no attempt to "get at the assets of the banking companies by nationalizing "their shares; the methods adopted were different and consisted, "first, of the seizure of the assets of the companies by confisca- "tion and then, in various ways, the destruction of the companies "themselves as legal entities.

"(17) In previous Russian bank cases in the English courts "there has been much discussion as to the precise date on which "the pre-revolutionary Russian banks must be considered to have "ceased to exist as legal entities under Soviet Russian law. But "in my opinion, the exact fixing of this date is immaterial when "considering the question as to the legal position under Soviet-"Russian law of the assets of those banks after the banks them-"selves had ceased to be legal entities. Whatever the precise "date of dissolution may have been, bearing in mind that the "banks were Tsarist law companies, their dissolution could not "in my view fail to have resulted also in the simultaneous and "automatic conversion of their free assets into the common "ownership of their late shareholders. In the following para-"graphs of this affidavit I therefore limit myself to consideration "of the two Soviet decrees which could be said to be chiefly "instrumental in the destruction of the banks as legal entities, "namely, (a) the Decree of 1917 and (b) the 'Decree of the "'Council of the People's Commissaries confiscating Share "'Capital of the Former Joint Stock Banks' published on "January 26, 1918 (hereinafter called 'the Decree of 1918').

"(19) On the one hand the Decree of 1917 was a declaration "of policy, namely, the policy of making banking a national "monopoly by dissolving or liquidating all the private banks "through their merger into the State Bank. Although intended "to cover the banking system of the whole of Russia, it was "vague in the extreme and although it provided for the merger "of all the private banks into the State Bank, the Decree failed "to give any indication as to the method by which the merger "was to be carried out. Indeed, on the face of it, it looks as if "under the Decree no merger was to be attempted until the "future publication of a special Decree concerning the method "of the merger (see section 4 of the Decree and paragraph 1 of "the instructions approved by the People's Commissary of "Finance on December 10, 1918).

"(20) On the other hand, the Decree of 1917 was not merely "a declaration of policy; it was a declaration of policy to be "acted on. In Petrograd, all the offices of the principal private "banks were seized by agents of the Soviet Government on the "day of the passing of the Decree, and in actual fact a few hours "before it was finally passed, as a first step towards their merger "into the State Bank; and as the Soviet régime extended to "new places, the same procedure was applied in one place after "another, at varying intervals of time. Thus the process of "nationalization, dissolution, liquidation or merger (whatever one "calls it) became decentralized. The unit for this process was "not the whole of a bank at once, but each office or branch of a "bank, or, rather, all the offices of all the private banks situate "in any locality where the Soviet authorities found themselves

“ ready and able to start the process. No branch of a private
“ bank which had not been directly affected by the process was
“ either bound or allowed to declare itself a branch of the State
“ Bank on its own authority. Moreover, such a branch had to
“ go on transacting business as best it could in order to avoid
“ being accused of sabotage, and in the circumstances it had no
“ right to transact business otherwise than in the name of the
“ old bank. On the other hand, every branch or office of a
“ bank over which the process of merging it into the State Bank
“ had been carried out, was lost for the bank to which it previously belonged.

“ (21) The extension of this process to the last functioning
“ branch or office of the bank inevitably had a double effect;
“ first, it resulted in the dissolution of the bank as a legal entity;
“ secondly, having regard to the constitution of the bank as a
“ Tsarist law company, it resulted in the simultaneous conversion of these assets of the bank which were outside the
“ ambit of Soviet confiscation into the common ownership of
“ the persons who immediately prior to the dissolution were the
“ bank's shareholders. So long as the bank remained a legal
“ entity, however crippled, it legally could not fail to be the
“ old bank and belonged to its shareholders. When the bank
“ ultimately ceased to be a legal entity, it ceased to have shareholders, but its assets which were still free from Soviet confiscation automatically became and have remained ever since
“ in the common ownership of its former shareholders.

“ (22) As regards the effect of the Decree of 1918, I beg
“ leave to quote from the evidence which I gave before the
“ Court of Appeal in the case of *Deutsche Bank* v. *the Bank*
“ (1930 D. No. 1435): ‘ I now refer to section 2 of the Decree
“ ‘ of January 26, 1918, which section is as follows: “ All bank
“ ‘ “ shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped.”
“ ‘ If read separately, section 2 of the Decree of January 26,
“ ‘ 1918, is in my opinion of itself quite sufficient to justify the
“ ‘ conclusion that all the old Russian Joint Stock Banks ceased
“ ‘ to exist as legal entities of Soviet law not later than the
“ ‘ date of the Decree. Section 2 declares null and void all
“ ‘ bank shares. But without a share there is no shareholder,
“ ‘ and without shareholders there can be no company. However, such an interpretation of section 2 of the Decree of
“ ‘ January 26, 1918, clearly contradicts the whole course of
“ ‘ events as it can be seen from the instructions of December 10,

" ' 1918. It contradicts the Decree of September 20, 1918, in " ' which the Council of People's Commissars [*sic*], the same " ' body which passed the Decree of January 26, 1918, instructs " ' the Commissary of Finance to go on with the nationalization " '(or liquidation) of all the *still existing* private credit institu- " ' tions. To make ends meet the only construction which I am " ' able to put on section 2 of the Decree of January 26, 1918, is " ' that it was a warning to the shareholders of the old banks " ' that after the carrying out of the liquidation of the banks " ' by the Executive in accordance with the Decree of December " ' 14, 1917, they will get nothing. Under the principal Act " ' all the assets and liabilities of the old banks were to pass " ' to the State Bank. The share capital of a bank is one of " ' its liabilities, and so it looked as if the State Bank were " ' to be liable to the shareholders of the private banks for the " ' nominal value of their shares. The Decree of January 26, " ' 1918, warned the shareholders that nothing will be paid to " ' them at any time. This threat was however mitigated or " ' entirely taken away by the Decree of April 18, 1918, which " ' proceeds on the assumption that holders of shares which are " ' declared null and void are entitled to have their interests " ' under the shares protected. The second part of section 2 " ' of the Decree of January 26, 1918 ("payment of dividends " ' " of any kind whatsoever is unconditionally stopped "), shows " ' that at that time the banks were still for many purposes in " ' the hands of their old owners and it was not impossible for a " ' bank to arrange the payment of dividend.'

" I adhere to my views as expressed above, namely, that the " Decree of 1918, however formidable its language, had no real " effect on the existence of the bank as a legal entity or on the " continued existence of its shares.

" (23) If, however, the true effect of the Decree of 1918 was " that the bank's shares were thereby annulled, it inevitably " follows that the Decree of 1918 had the effect of simultaneously " destroying the bank as a legal entity, in which case, in my " opinion, the inevitable conclusion must be that on January " 26, 1918, the assets of the bank which were still free from " Soviet confiscation automatically came into the common " ownership of its late shareholders. I am unaware of any case " where, under Tsarist law, all the shares of a company have " simultaneously been declared null and void. But bearing in " mind the effect under Tsarist law of the dissolution of a com- " pany on its assets, I have no hesitation in saying that such a

" simultaneous annulment of all its shares inevitably amounted " to a dissolution, and would equally inevitably carry with it " the natural consequences of a dissolution which I have dis- " cussed earlier in this affidavit.

" (24) In my view, therefore, the Decree of 1917 was not " itself sufficient to bring about the immediate dissolution of " the bank, and the ultimate dissolution which was initiated by " that Decree did not take place until the physical occupation " of the bank's branches in Russia had been completed, probably " in or about the year 1920. If, however, the effect of the " Decree of 1918 was to bring about a simultaneous annulment " of all the bank's shares (which, for the reasons which I have " given, was not in my view its true effect), then this annul- " ment itself inevitably resulted in the dissolution of the bank. " But whichever date is taken as the date of dissolution, the " necessary result was that the bank's assets, in so far as they " had not been effectively confiscated by the Soviet revolutionary " legislation, were converted into the common ownership of its " late shareholders; and this situation has remained unaffected " by any subsequent Soviet legislation."

I have to consider whether these conclusions are " extrava- " gant " in the sense in which Atkin L.J. used the word, or " impossible " in the sense in which Scrutton L.J. used it.

The first thing which I have to bear in mind is that the rules for construing Soviet decrees differ widely from those applied in England to construe English statutes. Who would construe them by reference to a speech or article by a politician, prominent or otherwise? Yet Dr. Dobrin has given evidence about rules of construction which I must accept. He said this: " In " September, 1917, when Lenin and his party were pronouncing " on the problem, he wrote a number of articles (and one in " particular of which I have an extract here) dealing particularly " with the nationalization of banks. In that article he declared " something which makes no sense to anybody in ordinary con- " ditions. He declared nothing less than this: 'Do not be " ' afraid of our project of nationalizing the banks. No one will " ' suffer the slightest injury. Anyone who had shares will after " ' the nationalization retain his money again in shares as before. " ' Everyone who had a deposit will retain his deposit.' So it " made no sense at all, but the declaration was: 'No one will " ' suffer any damage from our nationalization of banks.' " " (Q) Is that a statute? " " (A) No, my Lord." " (Q) Can " you construe statutes by speeches in Russia? " " (A) Oh yes, "you cannot do otherwise, or you get lost." "(Q) That is to "say, a Russian politician makes a speech and that is the basis "of the construction of statutes in Russia—is that right?" "(A) Yes, not every speech, but you cannot do this in Russia "unless you take into account the circumstances which precede "it." "(Q) I did ask you a question to which, so far as "English law is concerned, the answer, of course, would be "quite definitely 'No.' But Russian law may be different. "Do you seriously tell me—you have done—that in Russia you "can construe statutes by the speeches of politicians? In that "case I shall know where I am. Is that so?" "(A) Yes, by "speeches of important politicians." "(Q) And who decides "who is an important politician?" "(A) I should be at a loss "to understand and answer a question of that kind." "(Q) I "cannot understand any system of jurisprudence which can "work on such a basis." "(A) In textbooks laying down the "construction of statutes it says in so many words: 'Do not "'rely on the mere statement of the law. Look at what has "'been made of the law in practice. Otherwise you will get "'in an impossible position.'" "(Q) That is something quite "different. What has been made of the law in practice I "suppose means how it has been administered—is that right?" "(A) Yes." "(Q) That, with all respect, is nothing to do with "speeches by politicians?" "(A) I understand that; but still "speeches by politicians, including Lenin, are important. I am "referring to his promise that no one will suffer anything from "the nationalization of the banks. If you read the fundamental "Decree of 1917 that Decree declares that all the assets and "all liabilities will be taken over, shall be taken over, are to "be taken over by the State."

Secondly, the Russian word translated "share" embodies a different concept from the English word "share." When Mr. Wilberforce suggested that a "share" was a "bundle of rights," Dr. Dobrin answered: "I should prefer 'document of title of a "'legal nature.'"

These reflections give me pause when I am asked to hold that Dr. Dobrin's interpretation of the relevant Decrees ought to be rejected. The crucial Decree is that of January 26, 1918, and what I am looking for in it is, not the confiscation of the assets of the bank, but the destruction or forfeiture of the ownership rights which would otherwise result from the dissolution of the bank.

The Decree is as follows: "(1) The share capitals (stock, "reserve and special) of the former joint stock banks are transferred to the State Bank of the Russian Republic on the basis "of complete confiscation. (2) All bank shares are declared null "and void, and payment of dividends of any kind whatsoever is "unconditionally stopped. (3) All bank shares must forthwith "be surrendered by the present holders to the local branches of "the State Bank. (4) The holders of bank shares which they "cannot produce must submit to the branches of the State Bank "register records of the shares in their holding, indicating their "exact whereabouts. (5) The holders of bank shares who have "failed to surrender them in accordance with paragraph 3, or to "submit register records of their shares in accordance with paragraph 4, within a period of two weeks following the day of the "publication of the present Decree, are punished by confiscation "of all their property. (6) All transactions and deeds of transfer "referring to bank shares are unconditionally prohibited. "Persons taking part in such prohibited transactions and deeds "are punished with imprisonment up to three years."

I must disregard section 5 because it is not known whether or not the shares with which I am concerned were surrendered or registered. Moreover, I must remember that if (as they purported to do) the Decrees had confiscated all assets of the bank everywhere, there was no obvious need to bother about extinguishing these rights of co-ownership.

With these considerations in mind, I approach the Decree. I accept Dr. Dobrin's evidence that section 1 refers to the assets of the bank and not to the shares of the shareholders.

I might have thought that section 2 did extinguish all rights attributable to former ownership of shares. But here I must remember that the word "shares" bears a different meaning in Russia, that the rules of construction are different, and that even to an English lawyer there is some inconsistency between rendering shares (in the English sense) null and void, and then proceeding to order them to be surrendered or recorded ("indi"cating their exact whereabouts") and in any case not to be transferred.

There is nothing else in this Decree which appears to extinguish rights of co-ownership if (as has happened) assets could be found to which these rights could attach.

I am therefore of opinion that I must accept the uncontradicted evidence of a truthful and highly skilled expert on Russian law. I realize that normally an expert should have recent practical experience as well as academic qualifications, and that though Dr. Dobrin was in Russia till 1925, he has not since had practical experience in Russia of the working of the Soviet Decrees, though he has kept in touch as far as has been possible outside Russia. But I am satisfied that the particular question with which I am concerned could not have arisen in a Russian court, that nobody could be better qualified to give evidence on this branch of Russian law than Dr. Dobrin, and that I at any rate have no qualifications at all to do so.

Therefore the Crown has, at the present stage of the liquidation, no claim to this fund as bona vacantia and the liquidator must take the proper steps to discover whether any claimants can prove their title to share in the surplus assets on the footing of this judgment.

This investigation will proceed on the footing that on the dissolution of the bank the former shareholders of the bank became entitled to participate in any available assets to an extent which bears the same proportion to the assets as their shares bore to the total issued capital of the bank at the date of its dissolution. Those last words will need careful consideration when we come to consider the form of the order.

After discussion with counsel, his Lordship said that the form of the order would be: "Declare that the surplus assets "of the company which are by English law unaffected by the "Soviet legislation for the confiscation of the assets of the bank "including the subject-matter of this summons are not at the "present stage payable to the Crown as bona vacantia but should "continue to be dealt with in accordance with the provisions of "the Companies Act, 1948, and on the footing that on the "dissolution of the bank the former shareholders of the bank "became entitled to participate in any available assets to an "extent which bears the same proportion to the assets as their "shares bore to the total issued capital of the bank at the date "of its dissolution."

In re MOSCOW MERCHANTS' TRADING CO. LTD.

PETITION TO WIND UP.

On October 22, 1956, a petition of the bank for the winding up of the Moscow Merchants' Trading Co. Ltd. was presented by the liquidator. The company was incorporated under the law of Imperial Russia on July 1, 1915, its original capital of two million roubles divided into 2,000 shares of 1,000 roubles each being at some time in 1916 doubled by the creation and issue of a further 2,000 shares of 1,000 roubles each. Its objects were to trade on a commission basis and for its own account in all sorts of products and goods of commercial and industrial circulation and also to exploit all sorts of commercial and industrial enterprises and agricultural estates in the Russian Empire and abroad. Under its statutes shares in it could be held only by Russian subjects and by the bank, and at all times the bank held 33 per cent. of its share capital, members of the bank's council 33 per cent., and the partners in A. V. Schwetzoff & Sons the remaining 34 per cent. The company's offices were in the bank's building in Moscow.

By virtue of article 1 of the Introductory Law of October 31, 1922, with regard to effectuating the operation of the Civil Code of the Russian Socialist Federal Soviet Republic as from January 1, 1923, and under articles 13 and 14 of that code the company could continue to exist juridically in Russia only if it took steps to re-register itself within a fortnight after January 1, 1923. It did not and, accordingly, on January 1, 1923, ceased to exist under the law of the U.S.S.R. It never established any branch or place of business in the United Kingdom, but did carry on business there or, alternatively, enter into commercial relationships with persons there. On January 1, 1923, it had, as a result of its commercial activites in the United Kingdom, a credit balance believed to be over £10,000 with City of London and Midland Bank Ltd. (afterwards Midland Bank Ltd.). The liquidator now contended that in the circumstances it was just and equitable that the company be wound up.

On November 5, 1956, the petition came before the court.

The court knew that there had been inserted in similar orders provisions considered to affect—and in one case construed as affecting—the Crown's position in relation to bona vacantia in such a winding up. Roxburgh J. therefore adjourned the petition for argument on the question whether it would be just and proper to insert in his order a provision for the benefit of creditors whose debts had become statute barred.

Raymond Walton for the liquidator. From the argument in *In re Banque des Marchands de Moscou (Koupetschesky)*, immediately preceding the present petition, it is already within the

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BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY), *In re.*

MOSCOW MERCHANTS' TRADING CO. LTD., *In re.*

court's knowledge that, in *In re Banque Industrielle de Moscou,*[15] Wynn-Parry J. construed a proviso in an order of the kind now sought as affecting the Crown's right to assets as bona vacantia in a winding up of this nature. It is nearly 25 years since the order winding up the bank was made in this country, quite 35 or more since its dissolution in Russia; and some such proviso as the one in that case is here desirable for the protection of creditors.

July 23. ROXBURGH J. This is a petition by the liquidator of the dissolved Russian corporation which formed the subject-matter of the judgment which I have just delivered for a compulsory winding-up order in respect of another dissolved Russian corporation.

When this petition first came before me on November 5, 1956, I was aware that provisions had been inserted in similar orders which were thought to have some effect on the position of the Crown in relation to bona vacantia in such a winding up; and, indeed, one such provision had been assumed to be effective in *In re Banque Industrielle de Moscou,*[16] and had been construed accordingly.

I therefore thought that it might be just and proper to insert some provision for the benefit of creditors whose debts became statute barred during the long period during which the corporation remained in a state of absolute dissolution, and I stood the petition over for argument on this point. But, as I have just held that no such provision has any effect on the mandatory course of winding up as prescribed by statute, it follows that the order should now be made without qualification.

Declaration and order accordingly.

Solicitors: *Slaughter & May; Treasury Solicitor; Theodore Goddard & Co.*

K. R. A. H.

[15] [1952] Ch. 919, 923, 924.

[16] Ibid.

GRIFFITH *v.* PELTON.

[1956 G. 1674.]

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July 3, 4, 5, 23.

Jenkins, Romer and Sellers L.JJ.

Landlord and Tenant—Option to purchase—Assignment—Assignment of residue of the term—No reference to option—Whether mere assignment of term operated as an assignment of benefit of option to assignee of the term.

By a lease dated May 17, 1935, P. demised certain freehold property to B. for a term of 21 years from March 25, 1935. The parties to the lease were thereinafter respectively described as "'the lessor,' "which expression shall include the estate owner or estate owners "of the reversion of the premises hereby demised expectant on the "term hereby granted, where the context so admits, and 'the "'lessee,' which expression shall include her executors, adminis"trators and assigns where the context so admits." The lease contained a proviso that "if the lessee shall within the period "hereinafter prescribed give to the lessor six months' notice in "writing of the desire of the lessee to purchase the fee simple of "the demised premises . . . then the lessor shall on the expiration "of such notice and upon payment of [a named sum] . . . "assure the said premises unto the lessee for an estate in fee "simple in possession . . . Provided nevertheless that this option ". . . shall not be exercised during the lifetime of the present "lessor the said [P.] but shall be exercised within one year next "after his death if he shall die during the term hereby granted "and nothing herein contained shall be construed as giving to the "lessee any option to purchase the fee simple of the demised "premises at any time after the expiration or sooner determina"tion of the term hereby granted unless the aforesaid notice shall "have been given by her before such expiration or determination."

By an assignment dated August 3, 1948, B. assigned to the plaintiff for a named sum the property comprised in and demised by the lease for the residue of the term thereby granted. This document contained no reference to the option.

P. died on March 2, 1956, and probate of his will was granted to the defendant on April 13, 1956.

By a deed dated March 22, 1956, B. gratuitously assigned (or purported to assign) the benefit of the option to the plaintiff if and so far as not already vested in him. On the same day the plaintiff gave notice in writing of the assignment "to the personal repre"sentative or personal representatives" of P. Also on the same day the plaintiff gave to "the personal representative or personal "representatives" of P. notice in writing exercising the option. The term granted by the lease expired on March 25, 1956.

On the question whether the benefit of the option was effectually vested in the plaintiff, either (a) by the assignment of the lease dated August 3, 1948, or alternatively (b) by the deed of March 22, 1956:—

Held, (1) that on the true construction of the proviso contained in the lease, including the definition to be read into it of the expression "lessee" as including the lessee's assigns, the original parties to the lease must be taken to have agreed that the option should be exercisable by B. herself or by any assignee of the term to whom she might assign the benefit of the option, and that a mere assignment of the term should operate as an assignment of the benefit of the option to the assignee of the term; and that, accordingly, the assignment of August 3, 1948, effectually vested the benefit of the option in the plaintiff.

In re Adams and Kensington Vestry (1884) 27 Ch.D. 394 and *Batchelor* v. *Murphy* [1926] A.C. 63; 42 T.L.R. 112 applied.

Woodall v. *Clifton* [1905] 2 Ch. 257; 21 T.L.R. 581 considered.

(2) That in any event, if the assignment of August 3, 1948, did not pass the benefit of the option to the plaintiff, then it remained vested in B. and the deed of March 22, 1956, constituted an effective assignment of it to the plaintiff.

Per curiam. An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. But, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics of an option in gross. Accordingly, under the option provisions in the present case B. was entitled as a matter of contract to assign the benefit of the option contained in the lease to the plaintiff as her assignee of the term, so as to entitle the plaintiff to enforce it against the defendant, who, as the executrix of the original lessor, was bound by her testator's contract.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

The following statement of facts is taken from the judgment of the court: In this case the plaintiff (now respondent) Herbert Charles Griffith, claimed against the defendant (now appellant), Ethel Elizabeth Pelton, as executrix of Aubrey John Pelton, deceased, a declaration to the effect that he had by a notice in writing dated March 22, 1956, effectually exercised an option contained in a lease dated May 17, 1935, and made between the deceased of the one part and Winifred Martha Blaker of the other part, to purchase the property comprised therein, and consisting of No. 1, The Broadway, Mount Pleasant, Tunbridge Wells, together with a leasehold interest in a certain right of way, with consequential claims for specific performance of the agreement constituted by his exercise of the option, and further or other relief.

Upon an application by the plaintiff for summary judgment under R.S.C., Ord. 14A, an order was made by consent for the setting down of certain questions of law for argument under R.S.C., Ord. 34, r. 2.

The questions of law thus raised, so far as immediately material, were (shortly) whether the benefit of the option was effectually vested in the plaintiff, either (1) by an assignment dated August 3, 1948 (being an assignment of the lease by Miss Blaker to the plaintiff), or alternatively (2) by a deed dated March 22, 1956 (being an assignment, or purported assignment, of the benefit of the option by Miss Blaker to the plaintiff).

Vaisey J., by his order dated March 18, 1956, made a declaration answering the first of these questions in the plaintiff's favour, and from that order the defendant now appealed.

The lease of May 17, 1935, was made between the deceased of the one part and Miss Blaker of the other part. The parties were thereinafter respectively described as " ' the lessor,' which " expression shall include the estate owner or estate owners of " the reversion of the premises hereby demised expectant on the " term hereby granted, where the context so admits," and " ' the " ' lessee,' which expression shall include her executors, adminis- " trators and assigns where the context so admits."

The lease was for 21 years from March 25, 1935 (determinable as thereinafter mentioned), at the yearly rent of £450. There was a proviso that " if the lessor survives the term hereby " granted " (which event did not happen) " he will grant to the " lessee a further term of 14 years subject to the rent terms and " conditions of this lease." There was also a proviso enabling the lessee to determine the lease at the expiration of the first 14 years of the term.

Finally, there was this proviso conferring the option which had given rise to the present litigation: " Provided always and it " is hereby agreed that if the lessee shall within the period here- " inafter prescribed give to the lessor or leave at his last known " place of abode in England six months' notice in writing of the " desire of the lessee to purchase the fee simple of the demised " premises and his leasehold interest in the right of way over the " passageway coloured yellow on the said plan then the lessor " shall on the expiration of such notice and upon payment of the " sum of seven thousand pounds together with interest thereon " at the rate of five pounds per centum per annum from the " expiration of such notice till the completion of the purchase and " of all rent hereby reserved up to such expiration assure the "said premises unto the lessee for an estate in fee simple in "possession free from incumbrances except as already disclosed "to the lessee and assign his interest in the said right of way to "the lessee Provided nevertheless that this option to purchase "the fee simple of the demised premises shall not be exercised "during the lifetime of the present lessor the said Aubrey John "Pelton but shall be exercised within one year next after his "death if he shall die during the term hereby granted and "nothing herein contained shall be construed as giving to the "lessee any option to purchase the fee simple of the demised "premises at any time after the expiration or sooner determination of the term hereby granted unless the aforesaid notice "shall have been given by her before such expiration or "determination."

By the assignment of August 3, 1948, to which reference has already been made, Miss Blaker (having first duly obtained a licence so to do from the deceased as required by the lease) assigned to the plaintiff at the price of £3,200 the property comprised in and demised by the lease for the residue of the term thereby granted, subject to the rent thereby reserved and the lessee's covenants and conditions therein contained. This document contained no reference to the option.

It included, in addition to the lease, an assignment of the goodwill of a business carried on at the premises to which the purchase consideration was no doubt to some extent attributable.

The deceased died on March 2, 1956, and probate of his will was granted to the defendant on April 13, 1956.

By the deed dated March 22, 1956 (already referred to), Miss Blaker gratuitously assigned (or purported to assign) the benefit of the option to the plaintiff if and so far as not already vested in him.

On the same day the plaintiff by his solicitors gave notice in writing of this assignment to "the personal representative or "personal representatives" of the deceased.

Also on the same day the plaintiff by his solicitors gave to "the personal representative or personal representatives" of the deceased notice in writing exercising the option.

The term granted by the lease expired on March 25, 1956.

G. H. Newsom Q.C. and *Kenneth Elphinstone* for the defendant. (1) The court should first construe the covenant creating the option. The words here used are indistinguishable from those used in *Woodall* v. *Clifton*,[1] and the court should adopt the construction put upon the words in that case by Romer L.J.[2] and hold that "the covenant is aimed at creating, at a future "time, the position of vendor and purchaser of the reversion "between the owner and the tenant for the time being." That is to say, it was intended, as a matter of construction, that the benefit of the covenant should run with the term and the burden with the reversion.

(2) It is established by *Spencer's Case* [3] and the Grаunties of Reversions Act, 1540, and is recognized by all the textbooks, that the benefit and burden of covenants between lessor and lessee run with the term and the reversion respectively if, and only if, they "touch and concern the thing demised." The direct authority on this point, as regards the benefit of a covenant running with the term, is *Thomas* v. *Hayward*.[4] It was established by the decision of the Court of Appeal in *Woodall* v. *Clifton* [5] that a covenant creating an option for the termor for the time being to purchase the reversion does not touch or concern the thing demised. Reliance is therefore placed on the syllogism: (i) The benefit of this covenant cannot run with the term unless it touches or concerns the thing demised: *Thomas* v. *Hayward*.[6] (ii) This being a covenant purporting to entitle the termor for the time being to purchase the reversion, it does not touch or concern the thing demised: *Woodall* v. *Clifton*.[7] Therefore, (iii) the benefit of this covenant cannot run with the term. In these circumstances, when the parties sought, as they did, to create an option the benefit of which would run with the term, they were attempting to do something which the law forbids. It follows that on August 3, 1948, when Miss Blaker parted with the term, the benefit of the option did not pass to the plaintiff. At the same moment Miss Blaker ceased to be entitled to the option, because it was granted to her in the character of termor and she no longer possessed that character. The option therefore ceased to exist at the moment of the assignment of August 3, 1948.

(3) The plaintiff argued in the court below, and Vaisey J. accepted his submission, that the option was saved, and passed to him on August 3, 1948, as being something so bound up with the lease as to pass by implication of law upon an assignment

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[1] [1905] 2 Ch. 257.
[2] Ibid. 279.
[3] (1583) 5 Co.Rep. 15b.
[4] (1869) L.R. 4 Ex. 311.
[5] [1905] 2 Ch. 257.
[6] L.R. 4 Ex. 311.
[7] [1905] 2 Ch. 257.

of it. That submission is only saying that the benefit of the option runs with the term, which, as already indicated, is legally impossible. The argument was, however, said to be supported by *In re Adams and Kensington Vestry*,[8] *Batchelor* v. *Murphy*[9] (especially certain observations in the Court of Appeal[10]) and *In re Johnston's Application.*[11] These authorities, it is submitted, do not affect the matter. In *In re Adams and Kensington Vestry*[12] the option had been exercised by the tenant and accepted by the landlord; subsidiary questions had then to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by the court. This is the explanation of the *Kensington Vestry* case[13] given in terms by Romer L.J. in *Woodall* v. *Clifton.*[14] In *Batchelor* v. *Murphy*[15] the question was purely upon the construction of an agreement for a fresh lease requiring the insertion of a covenant creating an option, the landlord being himself a party to that agreement. *Batchelor* v. *Murphy*[16] went to the House of Lords, but *Woodall* v. *Clifton*[17] was not cited at any stage. Nor would it have been helpful to do so, since the question was upon a fresh contract entered into by the lessor. Moreover, it was admitted that the benefit of the option would pass by a mere assignment of the term: *per* Warrington L.J.[18] In the House of Lords Lord Atkinson appeared to be doubtful whether that admission was rightly made.[19] In *In re Johnston's Application*[20] the question turned upon the special wording of the War Damage Act, 1943, and, although *Woodall* v. *Clifton*[21] was cited, the decision of Harman J. was merely that nothing in *Woodall* v. *Clifton*[21] forbade him to construe the War Damage Act, 1943, in the way which would otherwise have commended itself to him.

(4) Assuming that the benefit of the option did not pass to the plaintiff by the assignment of August 3, 1948, he argues that he can still enforce it by virtue of section 56 of the Law of Property Act, 1925. He says that the covenant is expressed to be with the assigns of Miss Blaker, and that, since he is an assign, it amounts to an original covenant with him, which he is entitled to enforce under section 56. This argument cannot be

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[8] (1883) 24 Ch.D. 199; (1884) 27 Ch.D. 394.
[9] [1926] A.C. 63.
[10] [1925] Ch. 220, 226, 228, 231.
[11] [1950] Ch. 524.
[12] 27 Ch.D. 394.
[13] Ibid.
[14] [1905] 2 Ch. 257, 279.
[15] [1926] A.C. 63.
[16] Ibid.
[17] [1905] 2 Ch. 257.
[18] [1925] Ch. 220, 228.
[19] [1926] A.C. 63, 68, 69.
[20] [1950] Ch. 524.
[21] [1905] 2 Ch. 257.

right. Section 56 merely replaces (with immaterial amendments) section 5 of the Real Property Act, 1845, and it was held that that section could not be prayed in aid except by a person who could have been a party to the deed creating the covenant, though in fact he was not. To qualify, therefore, the person relying upon the section must prove that he was an ascertained person at the date of the covenant. The future assigns of a covenantee, however, must then have been not only unascertained but unascertainable. On this point reliance is placed on *Kelsey* v. *Dodd* [22] and *Forster* v. *Elvet Colliery Co.*[23]

(5) Finally, the plaintiff relies on the assignment of March 22, 1956, which he claims was valid either in equity or under section 136 of the Law of Property Act, 1925, written notice of this assignment having been duly given to the defendant. At common law the benefit of a covenant was not assignable. The only exception to the rule that no one could sue upon a covenant except the covenantee himself and his personal representatives was that, in the strictly limited class of cases covered by the rule in *Spencer's Case* [24] and the Grantees of Reversions Act, 1540, a person claiming the term or the reversion could sue upon a covenant the benefit of which was intended to run with the term or the reversion, as the case might be, and did in law so run. Equity permitted the assignment of the benefit of most contracts. But its method of operation was to compel the assignor to lend his name to the assignee for the purposes of an action at law upon the covenant. That is to say, the assignee was assisted by equity only if and so far as the assignor was still in a position himself to sue at law. But in the present case Miss Blaker ceased to be in a position to sue at law from the moment of the assignment of August 3, 1948, because her right to sue was in the character of termor and she had ceased to have that character. Therefore, by the time she came to make the assignment of 1956 she had nothing to assign: nemo dat quod non habet. It would therefore have been idle for equity to compel her to lend her name to the plaintiff, since an action in her name was bound to fail.

This situation is not altered by section 136 of the Law of Property Act, 1925 (which replaces section 25 (6) of the Judicature Act, 1873). These sections have repeatedly been held merely to provide machinery for an action at law to be brought by the assignee in his own name in those cases in which, in equity, he

[22] (1881) 52 L.J.Ch. 34.

[23] [1908] 1 K.B. 629.

[24] 5 Co.Rep. 15b.

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could have insisted on borrowing the name of the assignor under the old system: see *Torkington* v. *Magee*.[25] Moreover, the submission is supported by the terms of section 136 itself, which provides that, where the formalities of the section are duly complied with, there shall be transferred to the assignee " all " legal and other remedies " in respect of the chose in action. But Miss Blaker immediately before the assignment of March 22, 1956, had no remedies upon the chose in action. They could not, therefore, be transferred from her to the plaintiff.

(6) The case for the plaintiff, therefore, amounts to an attempt to find a way round the well-established principles of law enshrined in the rule in *Spencer's Case*,[26] and, however ingenious, should not be allowed to succeed. [Reference was also made to *Stromdale and Ball Ltd.* v. *Burden*[27]; *Sherwood* v. *Tucker*[28]; *Friary Holroyd and Healey's Breweries Ltd.* v. *Singleton*[29]; Smith's Leading Cases, 13th ed., p. 67; Foa's General Law of Landlord and Tenant, 7th ed., p. 417; Hill and Redman, Law of Landlord and Tenant, 12th ed., p. 135.]

E. I. Goulding for the plaintiff. The defendant is on the horns of a dilemma. If the option to purchase the reversion was an integral part of the lease, it passed to the plaintiff in 1948 by the assignment of the leasehold term. If, on the other hand, the true view is that the option was collateral, that is, something independent of the term, there is no valid reason why it should not have passed by the express assignment of it to the plaintiff in 1956. The defendant's argument is highly technical and ought not to succeed.

Reliance is placed on the following submissions as providing a means of escape from the syllogism on which the defendant relies.

(1) There is a large body of persuasive authority to the effect that the mere assignment of the benefit of the term does carry with it an option to purchase the reversion. One may accept that the covenant does not " touch and concern " the land in the *Thomas* v. *Hayward*[30] sense, but, nevertheless, it will as a matter of construction be held that the assignment of the term carries the benefit of the option with it. *Batchelor* v. *Murphy*[31] is an example of a collateral advantage which it was held could be exercised by the lessee for the time being and which would

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[25] [1902] 2 K.B. 427.
[26] 5 Co. Rep. 15b.
[27] [1952] Ch. 223, 232.
[28] [1924] 2 Ch. 440, 446.
[29] [1899] 1 Ch. 86.
[30] L.R. 4 Ex. 311.
[31] [1926] A.C. 63.

pass to the assignee by the mere assignment of the term. That case is authority for the proposition that *Thomas* v. *Hayward*[32] does not cover the whole field and that there are anomalous cases such as the present. The above argument would appear to be the basis of Vaisey J.'s decision.

(2) There is an ambiguity concealed in the use of the words "touching and concerning." The class of covenants which run with the land under a lease is not the same as the class of covenants which pass under the Graunties of Reversions Act, 1540. There is no essential identity between the class of covenants where, if the term is assigned, the burden or benefit (as the case may be) of the covenants pass to the assignee of the term, and that in which, if the reversion is assigned, the burden or benefit (as the case may be) of the covenants pass to the assignee of the reversion. These two branches of the law of covenants have a different origin.

At common law the recognition that the benefit of a covenant in a lease can be validly assigned was an exception to the general rule that the benefit of a contract cannot be assigned. There was no such exception in cases where the reversion was assigned. This doctrine, which caused great inconvenience, especially in the numerous sales which took place after the dissolution of the monasteries, led to the enactment of the Graunties of Reversions Act, 1540. The statute itself contained no words limiting the class of obligations transmitted on a sale of the reversion, but the courts have confined the wide words of the statute and made them applicable only to covenants touching and concerning the thing demised. The statute of 1540 was repealed by the Law of Property Act, 1925, and the present statutory provisions on this question are contained in sections 141 and 142 of that Act.

There is no reported decision which expressly holds that the benefit of such a covenant as the one in question does not pass on an assignment of the term. In *Woodall* v. *Clifton*[33] it would appear that the judgment of the Court of Appeal was confined to the effect of the statute 32 Hen. 8, c. 34. That is the explanation of the statement in the judgment that cases like *In re Adams and Kensington Vestry*[34] had no bearing on the question before the court. The *Kensington Vestry* case[35] did not relate to the devolution of the reversion. It was never suggested in argument in *Woodall* v. *Clifton*[36] that there was a distinction between

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[32] L.R. 4 Ex. 311.

[33] [1905] 2 Ch. 257.

[34] 27 Ch.D. 394.

[35] Ibid. 402.

[36] [1905] 2 Ch. 257.

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covenants running with the term at common law and covenants under the statute annexed to the reversion. The Court of Appeal confined their observations to the question whether liability to perform such a covenant as the present would run with the reversion.

The argument put forward by Charles Russell K.C. in *In re Johnston's Application*[37] is adopted as laying down the proper test in this matter. *Woodall* v. *Clifton*[38] only dealt with the question whether an option runs with *the reversion*. The present case is concerned with the question whether an option runs with *the term*. There is an inconsistency between the decision in *Woodall* v. *Clifton*[38] and certain statements in the judgments of the Court of Appeal in the *Kensington Vestry* case[39] and the speeches in the House of Lords in *Batchelor* v. *Murphy*.[40] These observations cannot be dismissed as bare obiter dicta. When *Woodall* v. *Clifton*[41] is read in conjunction with the other relevant cases it will be seen that it is too narrow in its conception of what touches and concerns the land. The true test for determining whether or not a covenant touches or concerns the land is that the covenant must (a) either directly affect the quality or value of the demised property or (b) it must affect the mode of enjoying the property. The first limb of the test, which was propounded by Lord Ellenborough C.J. in *Mayor, etc., of Congleton* v. *Pattison*,[42] suffices for the present case. Farwell L.J. adopted the first limb of the test in *Forster* v. *Elvet Colliery Co. Ltd.*[43] In the present case the grant of this option to purchase the reversion would or might enhance the value of the term in the lessee's hands and correspondingly diminish the value of the reversion in the lessor's hands.

If the above argument be rejected, it is submitted that nevertheless the plaintiff is entitled to succeed by virtue of the provisions of section 56 of the Law of Property Act, 1925. Although the 1948 assignment may not have conveyed by way of grant the benefit of the option to the plaintiff, nevertheless it did convey the term and, thereupon, the plaintiff became a person with whom the covenant was intended to be made and, accordingly, he is entitled to the benefit of the option under section 56.

It is conceded that the above argument could not have been raised under section 5 of the Real Property Act, 1845, which was the predecessor of section 56 of the Act of 1925. But the decisions subsequent to 1925 have taken a broader view of the language of section 56 than did the decisions pertaining to its predecessor. The section is no longer confined to agreements concerning "hereditaments and tenements," but extends to every other kind of property: see the definition of property in section 205 (1) (xx) of the Law of Property Act, 1925. It is worthy of consideration whether, in view of the definition of "property" contained in that Act, the court, in determining a question such as the present, is confined to the technicalities of the old law of real property. [Reference was made to *Stromdale & Ball Ltd.* v. *Burden.*[44]] *Kelsey* v. *Dodd*[45] and *Forster* v. *Elvet Colliery Co. Ltd.*[46] were decided on section 5 of the Real Property Act, 1845, and were concerned solely with real property. But section 56 of the Law of Property Act, 1925, is much wider in its language and the pre-1926 cases are not binding authorities on the interpretation of it. Section 56 has done away with or at least greatly modified the rule in *Tweddle* v. *Atkinson*[47] that no stranger can take advantage of a contract, though made for his benefit: see the observations of Denning L.J. in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt.*[48]

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[37] [1950] Ch. 524, 528.
[38] [1905] 2 Ch. 257.
[39] 27 Ch.D. 394.
[40] [1926] A.C. 63.
[41] [1905] 2 Ch. 257.
[42] (1808) 10 East 130, 135.
[43] [1908] 1 K.B. 629, 640.

Finally, let it be assumed that the law does not permit either at common law or by statute the creation of an option which will run with the term, then it is submitted that this lease contains two separate contracts: (a) the demise for a term; (b) an option exercisable in certain events. If in law these two contracts are not considered to be bound together, then there is no rule of law preventing them from being enjoyed separately. It follows, accordingly, that the option could be assigned separately from the term and that the 1956 assignment effectively assigned the benefit of the option to the plaintiff. *County Hotel and Wine Co. Ltd.* v. *London and North Western Railway Co.*[49] is an illustration of a case where the benefit of an option contained in a lease had been severed and later became reunited, but the option was not held invalid on that ground.

Newsom Q.C. in reply. The first problem is to construe the lease. It was drawn on the assumption that the lease and the option would be in the same hands at the date when the option was exercisable. The intention was to create at a future date

[44] [1952] Ch. 223, 231.

[45] 52 L.J.Ch. 34.

[46] [1908] 1 K.B. 629.

[47] (1861) 1 B. & S. 393.

[48] [1954] 1 Q.B. 250, 273, 274.

[49] [1918] 2 K.B. 251, 256, 263; affirmed [1919] 2 K.B. 29; [1921] 1 A.C. 85.

the relationship of vendor and purchaser between the lessor and termor for the time being. This option was distinctly limited so that its benefit should run with the term: on its construction this lease is entirely different from the lease considered in *County Hotel and Wine Co. Ltd.* v. *London and North Western Railway Co.*[49] If this construction be right, it follows that if the benefit of the covenant is to run with the term it must be a covenant which touches and concerns the thing demised: *Thomas* v. *Hayward.*[50] Does this covenant touch and concern the thing demised? The answer to that question would seem to have been in doubt until the decision of the Court of Appeal in *Woodall* v. *Clifton.*[51] In that case it was held that an option to purchase does not touch and concern the thing demised. The test is the same whether it is the benefit or burden of the covenant which is being considered. It is true that *Woodall* v. *Clifton*[52] was a decision on burden, but the court plainly had benefit in mind in its observations relating to the question of perpetuity.

The observations in *Batchelor* v. *Murphy*[53] are inconsistent with *Thomas* v. *Hayward,*[54] coupled with *Woodall* v. *Clifton.*[55] In any event they are mere obiter dicta. *Dewar* v. *Goodman*[56] is a complete answer to the plaintiff's contention that because the argument for the defendant is based on technicalities it ought not to succeed. Further, that case finally disposes of the plaintiff's argument that in considering the question in dispute there is a distinction to be drawn between the benefit and burden of the covenant.

If the above contentions be correct, there arises the question as to the effect (if any) of the 1956 assignment. As to that, the short answer is that the maxim nemo dat quod non habet applies: see *per* Willes J. in *Whistler* v. *Forster.*[57] [Reference was also made to *Torkington* v. *Magee*[58]; Sheppard's Touchstone, vol. 1, p. 176; Smith's Leading Cases, 13th ed., vol. 1, p. 52.]

Goulding in rejoinder. *Dewar* v. *Goodman*[59] does not reinforce *Woodall* v. *Clifton.*[60] It is an illustration that the doctrine of what " touches and concerns " the land is highly technical; the decision goes no further than holding that a covenant does not touch and concern the thing demised if it is to be performed on *other* land.

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[49] [1918] 2 K.B. 251.
[50] L.R. 4 Ex. 311.
[51] [1902] 2 Ch. 257.
[52] Ibid. 279.
[53] [1926] A.C. 63.
[54] L.R. 4 Ex. 311.
[55] [1905] 2 Ch. 257.
[56] [1907] 1 K.B. 612, 619; affirmed [1908] 1 K.B. 94, 97, 101, 102, 107, 108; [1909] A.C. 72, 75.
[57] (1863) 14 C.B.N.S. 248, 257, 258.
[58] [1902] 2 K.B. 427.
[59] [1909] A.C. 72.
[60] [1905] 2 Ch. 257.

Cur. adv. vult.

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July 23. JENKINS L.J. The judgment I am about to read is the judgment of the court. [His Lordship referred to the facts as set out above and continued:] On these facts Mr. Newsom, for the defendant, contends that both the questions shortly stated above should be answered in the negative.

As to the first question, he submits that the benefit of the option cannot have been effectually vested in the plaintiff by the assignment of August 3, 1948, because the benefit of the provision in the lease whereby the option was conferred did not run with the land. He invokes the second and sixth resolutions in *Spencer's Case*,[1] the effect of which is conveniently stated by Jelf J. in *Dewar* v. *Goodman*[2] as establishing the proposition that neither the benefit nor the burden (as the case may be) of a lessor's covenant runs with the land unless it touches or concerns the thing demised, or, as section 142 (1) of the Law of Property Act, 1925, now has it, is entered into "with reference to the "subject-matter of the lease." As illustrations of the application of the general principle he referred to *Thomas* v. *Hayward*,[3] where a lessor's covenant in a lease of a public-house not to keep any house for the sale of spirits or beer was held not to be enforceable by an assignee of the lease against the lessor because it did not touch or concern the thing demised and, therefore, the benefit of it did not run with the land; and to *Dewar* v. *Goodman*,[4] and affirmed in the Court of Appeal,[5] and in the House of Lords,[6] where an under-lessor's covenant to perform the covenants in the superior lease as regards land not included in the sub-demise was on like grounds held not to be enforceable by an assignee of the underlease against an assignee of the under-lessor.

The general principle on which Mr. Newsom relies is, of course, well settled, and he submits that its application to the case in point of an option contained in a lease to purchase the freehold is established by authority binding on us in the shape of the case in this court of *Woodall* v. *Clifton*,[7] where it was held that such an option did not touch or concern the thing demised, and therefore did not run with the land so as to be enforceable against the assigns of the lessor.

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[1] (1583) 5 Co.Rep. 15b.

[2] [1907] 1 K.B. 612, 620.

[3] (1869) L.R. 4 Ex. 311.

[4] [1907] 1 K.B. 612.

[5] [1908] 1 K.B. 94.

[6] [1909] A.C. 72; 25 T.L.R. 137.

[7] [1905] 2 Ch. 257; 21 T.L.R. 581.

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Mr. Newsom's submissions, if well founded, would produce the surprising result that although the intention of the parties to the present lease as expressed in the document plainly was that either Miss Blaker herself as the original lessee, or her executors, administrators and assigns, who were included in the term "lessee" by virtue of the definition to which I have referred, should be entitled to exercise the option by giving the prescribed notice and otherwise complying with the conditions laid down for its exercise, the option was nevertheless not assignable by Miss Blaker even by an assignment of the term which expressly included the benefit of the option. This, says Mr. Newsom, necessarily follows from the principle established by *Spencer's Case*,[8] that where a provision does not run with the land (as in his submission the present option does not), the parties cannot make it run, even where they show by express words their intention that the burden and benefit of it, as the case may be, should pass to the respective assignees.

Mr. Goulding, for the plaintiff, traverses Mr. Newsom's argument, and submits that the benefit of an option such as this, expressly made exerciseable not only by the original lessee but also by her executors, administrators and assigns, is an assignable interest which will pass to any assignee of the lease under a mere assignment of the term even though such assignment (like the assignment of August 3, 1948, in the present case) contains no express reference to the option.

Support for this view is to be found in the following authorities.

In *In re Adams and Kensington Vestry*[9] there was a lease containing a covenant by the lessor with the lessee, his executors, administrators and assigns, conferring upon the latter an option to purchase the freehold. This option was in fact exercised by the heir of the lessee, who was also his administrator, against the devisee of the lessor. No objection concerning the right of the heir and administrator of the lessee to exercise the option against him was taken by the devisee of the lessor and a conveyance was executed accordingly. The heir and administrator of the lessee afterwards contracted to sell part of the land conveyed to him, and the question for the decision of the court was whether he could make a good title. As the law then stood the position was that he could make a good title if the land had passed to him in his capacity as heir as part of the lessee's real estate, but not if it had passed to him in his capacity as administrator as part of the lessee's personal estate. The court held that the land had passed to him in the latter capacity, and consequently that he could only make a good title with the concurrence of the next-of-kin of the lessee. The case was heard at first instance by Pearson J. Amongst other arguments, it was contended for the purchasers [10] that the option was void as infringing the rule against perpetuities, and for the vendor that "such a covenant as this cannot be attached to a lease so as to "run with it." Pearson J. assumed,[11] without deciding, that the option was valid, i.e. (as we understand him), that it was not invalidated by the rule against perpetuities, and later on the same page said: "The case was very well argued by Mr. "Pownall, and he put it in this way. He said it is perfectly "true that the lease regarded as a chattel was part of the "personal estate of Ralph Adams, and was, therefore, on his "death intestate divisible amongst all his children, but the "covenant in question was a separate thing altogether. The "covenant giving the option to purchase created an equitable "interest in real estate, which was vested in Ralph Adams as a "separate interest from the leasehold interest. It therefore "descended to his eldest son as his heir at law, and on the "death of the eldest son it descended from him to the second "son, who was therefore entitled to it absolutely for his own "use. I cannot accede to that view. I think the option to "purchase was an integral part of the lease and went with the "lease. If the lease had been simply assigned, without any "more words, the option would have passed with it, and, as on the "death of Ralph Adams the lease passed to his administrator, "the administrator took the lease, together with the right to "enforce the option of purchase if he should think it beneficial."

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[8] 5 Co.Rep. 15b.

[9] (1883) 24 Ch.D. 199; (1884) 27 Ch.D. 394 (C.A.).

On appeal to this court by the vendor, the decision of Pearson J. was affirmed. Baggallay L.J. said [12]: "In that view "of the case it appears to me, first of all, that the right of option, "as one of the provisions contained in the lease, passed with "the leasehold estate to the administrator upon his taking out "administration to the deceased intestate, and that he alone "was capable of exercising that option."

Cotton L.J. said [13]: "The contract is one entered into with the lessee, his executors, administrators, and assigns, and before "I go further I agree that this covenant would be one the

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[10] 24 Ch.D. 199, 202.

[11] Ibid. 206.

[12] 27 Ch.D. 394, 401.

[13] Ibid. 402.

"benefit of which would pass with the assignment of the lease, "because it is a covenant with the lessee, if he, his executors, "administrators, or assigns shall give a certain notice, that the "lessor would convey. The 'assigns' there must mean the "assigns of the lease."

Lindley L.J. said [14]: "I am of the same opinion. It appears "to me that we must deal with the question in this case with "reference to the peculiar language of the covenant which is "before us. Everything turns upon the language of the "covenant, and I do not see how our decision in this case "would be of the slighest use to anybody else any more than the "decisions in the previous cases are of the slightest use to us "in construing this covenant. The covenant is made by Smith, "the lessor, with Adams, his executors, administrators, and "assigns, and so on. Now I apprehend 'assigns' there must "mean the assigns of the lease; the context, I think, shows that. "In the event which has happened there have been no assigns, "and we may leave that out. If he did not exercise the option, "his administrator could." And Lindley L.J. said [15]: "The "right is given to the lessee, his executors, administrators, and "assigns, and it is given to them in language which is very "peculiar. It is 'if they be minded and desirous of buying the "'fee simple,' not 'if the heir-at-law is.' I cannot possibly "construe this as meaning that the heir is to set them in "motion, and that the heir is to be minded and desirous of "buying. I cannot construe the covenant in that way at all."

Of the observations we have quoted, those of Pearson J. and Baggallay and Cotton L.JJ. appear to us to be directly in point, and to afford clear support for the plaintiff's argument in the present case. Those of Lindley L.J. are less to the purpose, but indicate no dissent from the views of his brethren, which as part of their ratio decidendi cannot in our opinion be dismissed as merely obiter.

We would next refer to *Friary Holroyd and Healey's Breweries Ltd.* v. *Singleton.*[16] In that case an equitable assignee of a lease containing an option to purchase the freehold given to the lessee "his executors, administrators, and assigns," who had not perfected his title by a legal assignment, was held by Romer J. (as he then was) not to be an assign within the meaning of the option and, accordingly, not to be entitled to exercise the option.

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[14] 27 Ch.D. 394, 404.

[15] Ibid. 405.

[16] [1899] 1 Ch. 86; [1899] 2 Ch. 261 (C.A.); 15 T.L.R. 448.

Romer J. said[17]: "The plaintiffs contend that the letter of "December 14, 1896, was a good notice under the lease to "purchase the freehold at the end of the term. But, apart from "any question arising on the wording of that letter, it appeared "on the evidence, when the plaintiffs came to prove their title, "that at the time the letter was written and up to the commencement of this action they were not the legal assignees of "the lease, but only the equitable assignees of the legal owners. "They were not, therefore, in my opinion the persons entitled "under the lease, as against the lessor, to give the notice, and "the lessor did not become bound under the lease on receipt of "that letter to sell or assure the freehold to the plaintiffs. The "word 'assigns' in the option to purchase in the lease given to "the lessee, his executors, administrators, or assigns, had in my "opinion the same meaning as the word 'assigns' added to the "lessee's name in the covenants entered into by and with him "in the lease. In other words, it meant the persons entitled to "the term as between them and the lessor and bound by and "entitled to the benefit of the covenants entered into by the "lessee and lessor respectively which ran with the land demised."

It seems to us plain that in Romer J.'s view the equitable assignee would have been entitled to exercise the option if he had converted himself into a legal assign by taking a legal assignment of the lease.

The case could, of course, have been shortly disposed of if Romer J.'s view had been that the option could not be exercised by any assign, whether legal or equitable. It is perhaps worth noticing that the defendant against whom the option was sought to be exercised was in fact the assignee of the reversion, and not the original lessor. Romer J.'s decision was reversed in the Court of Appeal on the facts, but the judgment of the court accepted his view as to the meaning of "assigns," and expressed no dissent from his statement of the law.

We should also make some reference to *Batchelor* v. *Murphy*.[18] In that case it was agreed between the original lessor, the executor of the lessee, and two proposed new tenants, that an existing lease should be surrendered and that a new lease of the premises should be granted to the proposed new tenants for the residue of the term "upon the same terms and "conditions in all respects" as the original lease. That lease had contained an option for the original lessor, his executors, administrators and assigns, to purchase the freehold, and the question was whether the two new tenants were entitled to a similar option. Tomlin J. (as he then was) held that they were not so entitled,[19] but in the Court of Appeal his decision was reversed by a majority of the Court of Appeal (Warrington and Sargant L.JJ., Sir Ernest Pollock M.R. dissenting), and that judgment was upheld in the House of Lords. In the course of his dissenting judgment, Sir Ernest Pollock M.R. said [20]: " It " —that is the option provision—" is a provision which is outside " the terms which regulate the relations between landlord as " landlord and tenant as tenant. It is in truth and in fact a " collateral bargain. It is not one of the terms of the demise. " It is incidental but collateral to the demise. In the present " case—and this I think is the only outside matter which has " any weight upon my mind—there is this. It is quite clear " that if the Murphys had taken by assignment of the original " lease of October 17, 1913, they would have acquired this " option. It would have passed to them under an assignment. " But it appears to me that one ought to take into account the " fact that assignment was not adopted to give the Murphys " the interest which they were to take in these premises."

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[17] [1899] 1 Ch. 86, 89.

[18] [1924] 2 Ch. 252; [1925] Ch. 220 (C.A.); [1926] A.C. 63; 42 T.L.R. 112.

Warrington L.J. said [21]: " Having regard to the interpretation of the word 'lessee' in the option, the word 'lessee' " means Clarkson, his executors, administrators and assigns. It " is therefore quite clear, and it is admitted, that the benefit of " the option, which although it is something collateral to the " mere relation of landlord and tenant, still is one of the terms " of the document which created that relation, would pass to " the assignee by a mere assignment of the land for the term, " at the rent, and under and subject to the conditions and so " forth reserved by and contained in the lease of October 17, " 1913."

Sargant L.J. said [22]: " Now it is to be noticed that if there " had been a mere assignment by Clarkson to the Murphys, the " necessary result would have been that the Murphys would have " been entitled to the option of purchase given to Clarkson by " the lease to him, and I should have thought that prima facie " if it had been intended in any way to affect that option or " prevent it being transferred in the ordinary course to the " purchasers or the assignees, the persons intending to take the " transfer from Clarkson, there would have been some definite

[19] [1924] 2 Ch. 252.
[20] [1925] Ch. 220, 226.
[21] Ibid. 228.
[22] Ibid. 231.

"bargaining to that effect. I do not want to lay too much stress "on that, but it seems to me that would have been the ordinary "business way of looking at the matter."

In the House of Lords Lord Haldane said[23]: "Now, my "Lords, as I said, the original lease contains an option to "Clarkson to purchase, and to purchase for £3,000, and be it "noted that by a provision in that document, wherever Clarkson "is named the document provides that Clarkson, his executors, "administrators and assigns, are to be included by the word "'Clarkson'; so that when the option to purchase is given to "Clarkson it prima facie at all events means to include Clarkson's assigns. That being so, my Lords, the question is what "is meant in the document of November, 1915, by 'the terms "'and conditions' in the lease of October 17, 1913? They are "to be 'the same terms and conditions in all respects,' as in "the lease. My Lords, we are not dealing with a mere technical "demise, we are dealing with a deed, the lease itself—a deed "containing terms—and when you look at the substance of this "transaction I quite agree that the option to purchase is a "collateral right—it is not part of the term of the demise, it is "a collateral right—but it is a collateral right which is included "in the document, which in substance is transferred. I say in "substance is transferred, because if you look at the document, "Clarkson could have done what he did by an assignment of his "lease or in the way he did—namely, by surrender and a new "lease to be granted. There is no difference in substance "between the two methods or the rights under them; it is only "a different way of carrying out the same transaction, and I am "of opinion that Clarkson, in substance, transferred his rights "to the respondents."

Lord Atkinson said[24]: "It is quite true that when there is "a collateral agreement, it is not necessarily transferred by a "transfer of the lease, but it is perfectly competent to the "contracting parties if they are so inclined to use language "which will carry in a collateral agreement just as well as any "stipulation springing from the relation of landlord and tenant. "In my opinion when the parties used the words that the new "lease is to contain all the terms and conditions in all respects "as the lease of October 17, 1913, which, of course, means "contained in the lease of October 17, 1913, they could use no "words that are more expressive to convey the idea that the

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[23] [1926] A.C. 63, 67, 68.

[24] Ibid. 68, 69.

"new lease is to be a replica of the old lease save and except "in the two points of duration of the time and rent."

Lord Carson concurred without adding any reasons of his own, while Lords Wrenbury and Blanesburgh founded themselves on the construction of the agreement, without, we think, expressing any view regarding the effect which an assignment of the original lease would or might have had in relation to the option if the parties had chosen to proceed in that way.

Reference was also made in the course of the argument to *In re Johnston's Application*,[25] a case concerning the apportionment of war damage, in which Harman J. held that an option to purchase the freehold contained in a lease was for this purpose an "incident" of the lessees' proprietary interest.

In this state of the authorities Mr. Newsom urges us to follow *Woodall* v. *Clifton*,[26] which he says concludes the present case in his favour, and to reject all observations to the contrary in the other authorities to which we have referred as made obiter or alio intuitu or on the strength of admissions. In particular, he adopts this comment by Romer L.J. towards the end of the judgment of the court in *Woodall* v. *Clifton*,[27] as disposing of what is perhaps the most difficult case from his point of view: "There are cases where the option has been exercised by the "tenant and accepted by the landlord, and subsidiary questions "have had to be decided which naturally would be dealt with on "the footing that what had already been done could not or need "not be questioned by the court; as, for example, *In re Adams* "*and Kensington Vestry*.[28] But such cases are really of no "assistance for the decision of the present case."

On the other hand, Mr. Goulding submits that the cases above referred to relating to options to purchase other than *Woodall* v. *Clifton*[29] taken together afford a strong body of judicial opinion in favour of the plaintiff's contention by which, in preference to *Woodall* v. *Clifton*,[29] the court should be guided in deciding the present case.

In order to resolve this conflict it will be necessary to examine with some care *Woodall* v. *Clifton*[29] to see what was actually decided by that authority. But before doing so we may perhaps be permitted some general observations of an elementary kind as to the nature of options to purchase land.

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[25] [1950] Ch. 524; 66 T.L.R. (Pt. 1) 521; [1950] 1 All E.R. 613.

[26] [1905] 2 Ch. 257.

[27] Ibid. 279.

[28] 27 Ch.D. 394.

[29] [1905] 2 Ch. 257.

It is by no means uncommon for leases to contain (as did the present lease) provisions conferring on the lessee an option to purchase the freehold. But options to purchase land are also not uncommonly granted in cases where the grantor and the grantee of the option do not stand in the relationship of landlord and tenant. Options of the latter class may conveniently be referred to as "options in gross."

An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, upon giving the prescribed notice and otherwise complying with the conditions upon which the option is made exercisable in any particular case. The conditional contract constituted by the grant of the option is a chose in action the benefit of which can (if the terms of the contract are such as to show that it is not merely personal to the grantor) be assigned by the grantee to anyone he chooses, subject to any restriction imposed by the contract as to the persons in whose favour assignment is permissible. The burden of the contract qua contract does not, in the absence of novation, pass to a third party acquiring the land. But inasmuch as the option creates in favour of the grantee of the option a contingent interest in the land, it may, provided that its exercise is limited to a period permissible under the rule against perpetuities, and provided that the appropriate precautions as to registration are taken, be exercised and enforced against the land in the hands of such third party. See as to the rule against perpetuities in relation to options the judgment of Warrington J. (as he then was) in *Woodall* v. *Clifton*[29] and *Hutton* v. *Watling*,[30] in which two cases the authorities on this matter are discussed.

An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and the grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. But, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics of an option in gross.

These general observations lead us to the conclusion that under the option provisions in the present case Miss Blaker was entitled as a matter of contract to assign the benefit of the option contained in the lease to the plaintiff as her assignee of the term, so as to entitle the plaintiff to enforce it against the defendant, who, be it observed, was not an assignee of the reversion but the executrix of the original lessor, and as such bound by her testator's contract.

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[29] [1905] 2 Ch. 257.

[30] [1948] Ch. 26, 30 et seq.; 64 T.L.R. 326; [1948] 1 All E.R. 803.

Returning to *Woodall* v. *Clifton*,[31] we would observe that the plaintiff there seeking to enforce the option was an assignee of the original lessee to whom and whose heirs and assigns the option to purchase had been granted, while the defendants were assignees of the original lessor; and that the term during which the option was expressed to be exercisable was 99 years from June 24, 1866. The assignment of the reversion prevented the plaintiff from enforcing the option against the defendants as a matter of contract, and the plaintiff could only rely on the contingent or conditional interest in the land created by the option, because the period during which it was exercisable exceeded the limit of time imposed by the rule against perpetuities. Warrington J. held in those circumstances that the option to purchase was void on the ground of remoteness. The Court of Appeal apparently accepted this view so far as the plaintiff's claim involved the assertion that the option created an interest in the land which had devolved on him by assignment, but went on to consider an alternative contention to the effect that the burden of the proviso creating the option ran with the land so as to bind the assignees for the time being of the reversion at any distance of time.

That was the contention which Romer L.J., in delivering the judgment of the court, was concerned to repel, and he did so by holding that the burden of the proviso did not run with the land so as to make the option enforceable against the assignees of the reversion. He did not hold that if there had been no assignment of the reversion the plaintiff as assignee of the term could not as a matter of contract have enforced the option against the original lessor or his personal representative. We think it is reasonably plain that he was deciding nothing of the sort. This sufficiently appears from the opening passage of his judgment, where he said[32]: " A contract in a lease giving an option of purchase might " be good, without regard to the provisions of the statute of " Henry VIII, as binding the land in the hands of the heirs or " assigns, provided it did not infringe the law as to perpetuities.

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[31] [1905] 2 Ch. 257.

[32] Ibid. 278.

"It would not be the less a binding contract because it was "contained in a lease. But in the present case it is clear that "the plaintiff cannot succeed on such a ground. Unless the "covenant or proviso giving the option of purchase can be said "to run with the land by virtue of the provisions of the statute, "then the plaintiff must fail."

If it had been his view (as Mr. Newsom now would have us hold) that the plaintiff could not enforce the option because he was an assignee of the term, but not the original lessee, that would have been a short answer to the whole case and his discussion of the question whether the assignees of the reversion were bound would have been wholly otiose. The same may be said of Warrington J.'s full and careful discussion of the rule against perpetuities in its application to options to purchase land.

We would add that *Friary Holroyd and Healey's Breweries* v. *Singleton*[33] was referred to in argument in *Woodall* v. *Clifton*,[34] when Romer L.J. said of it: "In that case the question was, "assuming the validity of the covenant, who was the person "entitled to give notice to exercise the option?" That comment does not appear to us to cast any doubt upon the correctness of the view he had expressed in the former case on the point now in hand.

In our view, therefore, there is nothing in *Woodall* v. *Clifton*[35] to prevent us from holding that it was competent to Miss Blaker to assign the benefit of the option to the plaintiff so as to make it exercisable and enforceable by him against the defendant as executrix of the deceased original lessor. We agree with Vaisey J. (as indeed was held in *In re Adams and Kensington Vestry*,[36] *per* Cotton and Lindley L.JJ., and *Friary Holroyd and Healey's Breweries* v. *Singleton*[37]) that the reference to the assignees of the lessee imported by definition into the option provision must be construed as referring to assigns of the term, and consequently as limiting the assignability of the benefit of the option to assigns of that description. But, so far as assigns of that description are concerned, the language of the proviso conferring the option expressly entitles them to exercise it.

The first of the two questions stated above therefore seems to us to come down to the narrow issue whether the assignment of August 3, 1948, being on the face of it a mere assignment of the term, without any reference to the benefit of the option, operated, in view of the terms of the proviso, or, in other words, the contract, creating the option, as an assignment of the benefit of the option; or whether an express reference to the benefit of the option in the assignment of the term was necessary to produce that result. We think that upon the true construction of the proviso, including the definition to be read into it of the term lessee as including the lessee's assigns, the original parties to the lease must be taken to have agreed that the option should be exercisable by Miss Blaker herself or by any assignee of the term to whom she might assign the benefit of the option, and that a mere assignment of the term should operate as an assignment of the benefit of the option to the assignee of the term. On this point we find ourselves in complete agreement with the following passage from the judgment of Vaisey J.: "I now come to what "seems to me to be the main point of the case, which is whether "the benefit of the option passed by the assignment of 1948, or, "if not, then by the assignment of 1956. Taking the assignment "of 1948 first, it seems to me that the benefit of the option did "pass by it to the plaintiff notwithstanding the omission of any "reference to it. Admittedly it was a collateral contract, independent in some respects of the main contract between the "parties as lessor and lessee. I think the point is covered by "*In re Adams and Kensington Vestry*[38]; see *per* Pearson J." Then he reads part of what I have already quoted from the judgment of Pearson J., including: "If the lease had been simply "assigned, without any more words, the option would have "passed with it." Then the judge continues: "In the same "case in the Court of Appeal[39] the decision of Pearson J. was "affirmed."

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[33] [1899] 1 Ch. 86, 90.
[34] [1905] 2 Ch. 257, 269.
[35] [1905] 2 Ch. 257.
[36] 27 Ch.D. 394, 402, 404.
[37] [1899] 2 Ch. 261.

Then Vaisey J. quotes Cotton L.J.'s observations[40] and goes on: "To the same effect is *Batchelor* v. *Murphy*.[41]" Vaisey J., then, after briefly stating the nature of that case and quoting a passage from the judgment of Warrington J., to which we have already referred,[42] continues: "And the authority of that decision "is enhanced and certainly in no way diminished by the report "of the same case in the House of Lords,[43] and support is given "to the same view by *In re Johnston's Application*.[44]"

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[38] 24 Ch.D. 199, 206.
[39] 27 Ch.D. 394.
[40] Ibid. 402.
[41] [1925] Ch. 220.
[42] Ibid. 228.
[43] [1926] A.C. 63.
[44] [1949] Ch. 524.

For these reasons we are of opinion that the first of the two questions raised should be answered in the affirmative, that is to say, in the sense that the assignment of August 3, 1948, did, as Vaisey J. held, effectually vest the benefit of the option in the plaintiff.

That conclusion makes it strictly unnecessary to answer the second question, concerning the efficacy of the deed of March 22, 1956, which purported to assign the benefit of the option to the plaintiff, if and so far as not already vested in him by the assignment of August 3, 1948, and Vaisey J. did not deal with it.

But in case we are wrong in holding the assignment of August 3, 1948, to have included the benefit of the option, we should perhaps briefly indicate our view on this second question also.

If the assignment of August 3, 1948, did not pass the benefit of the option to the plaintiff, then in our view the benefit of the option remained vested in Miss Blaker. True it is that by the terms of the option provision Miss Blaker could only assign it to an assignee of the term, but we fail to see why it should not have been competent to her to assign it to the plaintiff, who was in fact the assignee of the term.

Mr. Newsom contended that the benefit of the option if, contrary to his submission on the first question, it was assignable at all, was only assignable along with and by the same instrument as the term; and accordingly that by assigning the term without including the option Miss Blaker destroyed the option, which thus became incapable of assignment to the plaintiff or anyone else.

We find it impossible to accede to this argument and are clearly of opinion that the deed of March 22, 1956, must have constituted an effective assignment of the benefit of the option to the plaintiff if the assignment of August 3, 1948, did not.

Mr. Newsom raised a subsidiary contention to the effect that the notice of March 22, 1956, purporting to exercise the option was bad because on the true construction of the option provision the six months' notice required for its exercise must, in order to be effective, expire with or before the expiration of the term. He relied on the condition requiring payment of all rent up to the expiration of the notice as showing that the provision contemplates that rent should be accruing down to the date of such expiration, which could only be so if the lease was still on foot. We can attach no weight to this point. There is nothing in this

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condition as to rent which can as a matter of language be regarded as inconsistent with a notice expiring after the end of the term, as in that case the condition would be literally complied with by payment of all rent due down to the end of the term. It is true that there would then be a hiatus in the shape of the period from the expiration of the lease down to the expiration of the notice during which no rent would be in terms reserved. But the parties appear, very sensibly, to have acted on the footing of an implied obligation on the lessee to continue to pay rent during this period, as it seems that rent since March 25, 1956, has in fact been paid and accepted.

Moreover, we think Mr. Newsom's contention is quite plainly negatived by the latter part of the provision, which is to the effect that: " nothing herein contained shall be construed as giving to " the lessee any option to purchase the fee simple of the demised " premises at any time after the expiration or sooner determination of the term hereby granted unless the aforesaid " notice shall have been given by her before such expiration or " determination." That language expressly allows for a notice given before but not expiring till after the end of the term.

Various other arguments and authorities were touched upon in the course of a long and highly technical discussion, but we have we think dealt sufficiently with the essential points.

For the reasons we have endeavoured to state we think that Vaisey J. came to a right conclusion in this case, and we would dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Gregory, Rowcliffe & Co. for Risdon, Weston, Witham & Hancock, Minehead; Slaughter & May.*

J. A. G.

1957
Oct. 16, 17;
Nov. 6.

Harman J.

In re LOCKWOOD, DECD.
ATHERTON *v.* BROOKE AND ANOTHER.

[1957 L. No. 966.]

Administration of Estates—Order of application of assets—Intestacy—Next-of-kin—Intestate survived by issue of uncles and aunts—Crown claiming intestacy because no uncle or aunt surviving—Whether words in statute ignored to avoid capricious result—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 47 (5)*—Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64), *Sch. I.*

Bona Vacantia—Administration of estates—Intestacy.

Statute—Construction—Absurdity—Avoiding capricious result—When words of statute may be ignored.

The next-of-kin of a spinster who died intestate were the issue of her uncles and aunts of the whole blood. The Crown claimed the estate of the intestate as bona vacantia under the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952,[1] on the ground that the words in section 47 (5) of the Act of 1925, as amended, required the survival of a member of the primary class, namely, uncles or aunts, in order that the issue of that class could claim in the intestacy:—

Held, that the construction for which the Crown contended would have the effect of preferring the remoter to the nearer in blood and could not have been intended by the legislature when laying down the rules for ascertaining next-of-kin; and the court, to avoid such a capricious result, was entitled to ignore the words "or issue of any member of that class," or to treat them as not binding it to construe "class" in the earlier part of the subsection as confined to the primary class of uncles and aunts; accordingly, the estate of the intestate was held on trust for the issue of the uncles and aunts.

ADJOURNED SUMMONS.

Maude Emily Lockwood died a spinster and intestate in 1954 at the age of 76. The plaintiffs, to whom letters of administration had been issued, were grandchildren of one of her uncles on the paternal side. The first defendant was a grandchild of an aunt on the same side. The estate in the plaintiffs' hands was of a value of some £6,000. The evidence as to pedigree was not complete, but it appeared to show that the deceased, a spinster, left no parent, no brothers or sisters and no grandparents, and that her nearest of kin would be the class of persons claiming under her uncles and aunts of the whole blood. It further appeared that no uncle or aunt of the whole blood survived her. The Crown claimed that by reason of the addition of subsection (5) to section 47 of the Administration of Estates Act, 1925, by the Intestates' Estates Act, 1952, the issue of the intestate's uncles and aunts could not claim under her intestacy because no uncle or aunt had survived her.

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[1] Administration of Estates Act, 1945, s. 47, as amended by the Intestates' Estates Act, 1952: "(5) It is "hereby declared that, where the "trusts in favour of any class of relatives of the intestate, other than "issue of the intestate, fail by reason "of no member of that class attaining "an absolutely vested interest, the "residuary estate of the intestate "and the income thereof and all "statutory accumulations, if any, of "the income thereof, or so much "thereof as may not have been paid "or applied under any power affecting the same, shall, by virtue of "subsections (2) and (3) of this "section, go, devolve and be held "under the provisions of this Part "of this Act as if the intestate had "died without leaving any member "of that class, or issue of any "member of that class, living at the "death of the intestate."

Question 1 on the summons was whether, in the events which had happened, the residuary estate of the intestate was held by the administrators (a) on the statutory trusts for the issue of the uncles and aunts of the intestate (being issue of brothers and sisters of the whole blood of a parent of the intestate); or (b) on trust for the Crown as bona vacantia.

Oliver Lodge for the administrators.

Nigel Warren for the first defendant, representing the next-of-kin. The right of this defendant (who is a first cousin once removed of the intestate) to a share of her estate as next-of-kin is not affected by the addition of subsection (5) to section 47 of the Administration of Estates Act, 1925. Before 1926 the rules of descent were governed by the Statute of Distributions, 1670. The Act of 1925, as regards deaths after 1925, revolutionized the old rules of descent. The Intestates' Estates Act, 1952, had a much more limited object in view, namely, to increase the rights of surviving spouses.

The word "class" where it first appears in subsection (5) of section 47 means a composite class and includes issue. It has the same meaning as in subsection (4) of section 47, where it is clearly a composite class of more than one generation.

The intention of subsection (5) was to be declaratory only; it is prefaced by the words "It is hereby declared that . . ." The scheme of the subsection is not "It is hereby declared that "the trusts shall fail where . . ." but "It is hereby declared "that, where the trusts . . . fail . . . ," in other words, it does not operate to cut down, but to elucidate. It attempts to dot the i's and cross the t's of what has gone before; it was a measure of tidiness designed to lay the dust, not to raise it. It may have been thought necessary to add it by way of parallel to section 47 (2) of the Act; that subsection was itself an unnecessary embellishment. It is therefore easier to find that subsection (5) itself was purely declaratory and had no other effect.

The trusts referred to in subsection (5) are the statutory trusts, that is, the trusts set out in section 47 (1) (i) and (3) and not those trusts as modified by subsection (5).

Reliance is placed on the expression "shall, by virtue of sub-" sections (2) and (3) of this section, go, devolve and be held . . ." If the Crown's contention is right, this would be inappropriate. What would be required would be some such expression as "not-" withstanding the previous provisions of this Part of this Act " and by virtue of this subsection," and there are no such words in section 47 (5).

The words " or issue of any member of that class " are words of supererogation. These words were inserted per incuriam by the parliamentary draftsman and should be ignored as a venial slip.

If the Crown's contentions were correct, it would lead to the most extraordinary results, and a complete revolution in the laws of intestate succession. The legislature cannot have intended to divest rights conferred by the earlier sections of the Act in this manner. Had it so intended, it would have expressed itself with much greater clarity.

A statute should be construed with regard to its real object: Maxwell on Interpretation of Statutes, 10th ed., p. 91. Obvious mistakes in property statutes were corrected in *In re Twigg's Estate* [2] and *Green* v. *Whitehead*.[3] The court will not construe words of a statute so as to lead to an absurd result: *Salmon* v. *Duncombe*,[4] *Hall* v. *Knox*,[5] *Rex* v. *Vasey* [6] and *Rex* v. *Ettridge*.[7] *Rex* v. *Ettridge* [7] is a particularly strong case. [Reference was also made to Maxwell, pp. 81–82, 160–164, 191, 201, 206, 208, 229, 236–237, 252–253.]

Denys Buckley for the second defendant, the Treasury Solicitor. The construction of section 47 (5) for which the next-of-kin contends results in the subsection having no effect at all. Some effect, however, can be given to the subsection by the construction for which the Crown contends, although it may have a surprising and capricious result, in a case such as the present, where the intestate was predeceased by her uncles and aunts so that no member of that primary class survived, but she was survived by the issue of those aunts or uncles, who upon this construction take nothing.

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[2] [1892] 1 Ch. 579.

[3] [1930] 1 Ch. 38; 46 T.L.R. 11.

[4] (1886) 11 App.Cas. 627.

[5] (1863) 4 B. & S. 515.

[6] [1905] 2 K.B. 748; 22 T.L.R. 1.

[7] [1909] 2 K.B. 24; 25 T.L.R. 391.

The only factor to recommend this construction is the plain meaning of the words of the subsection. If the words " or issue " of any member of that class " be deleted, the section has no operative effect at all, and the court should not say that the legislature is to be presumed to have enacted something which is inoperative. This is not like the cases which have been cited in argument where a statute had no operation at all on the actual words used, but it could be clearly seen what the legislature intended. Where the prima facie construction of the statute shows repugnancy, that is another matter, but the court is not entitled to take the view that it is not possible to construe a statute merely because the natural meaning of the plain words shocks the sensibilities.

[HARMAN J. Is there any principle which entitles me to reject the section because a mistake has occurred?]

The authorities do not go so far as that. It cannot be said that this is a repugnancy merely because the section operates to deprive persons of interests under the statutory trusts which they would have had before. That is not enough to entitle the court to ignore these words. Where a statute is declaratory in its nature, the argument that it must not be construed so as to take away previous rights is not applicable: see Maxwell on Interpretation of Statutes, 10th ed., p. 222.

Cur. adv. vult.

Nov. 6. HARMAN J. read a judgment in which he stated the facts and continued: The present summons raises the question whether, having regard to an amendment of the Administration of Estates Act, 1925, by the Intestates' Estates Act, 1952, descendants of uncles and aunts are cut out in favour of the Crown, represented here by the second defendant, the Treasury Solicitor. This, if it be right, would be surprising enough, but when it is realized that a further result of this construction of the amending statute is that if there were a surviving uncle or aunt of the half blood (as possibly there may be), descendants of uncles and aunts of the half blood would take in preference to similar relations of the whole blood, it is clear that so anomalous a result cannot have been intended by the legislature. The object of the two statutes was to distribute the estate of the intestate among her next-of-kin, and not to prefer the more to the less remote. Even more striking is the fact that a like result would ensue where the primary class is brothers and sisters, so that cousins would be preferred to nephews and nieces.

If the intestate had died in any of the years between 1926 and 1952 the position would have been clear enough. Under section 46 of the Administration of Estates Act, 1925, subs. (1) (v), there being no issue or parent, brother or sister, or descendants of theirs, uncles and aunts of the whole blood would come next, and the estate, being held on the statutory trusts for them, would, under section 47 (1) (i) and (3), be held in trust for the living issue of uncles and aunts attaining 21 or marrying and taking per stirpes. Thus, the plaintiffs and the defendant would be members of the class to take, to the exclusion of uncles and aunts of the half blood and their issue.

The Act of 1952 amended sections 46 and 47 of the Act of 1925, and these sections as amended are set out in the First Schedule to the Act of 1952. The main change is designed to improve the position of a surviving spouse, and section 46 (1) (i) has attached to it a table providing for the event of a husband or wife surviving. The statutory trusts are mentioned in this table. Subsections (ii), (iii), (iv) and (v) apply in the event of no spouse surviving. These repeat subsections bearing the same numbers in the Act of 1925, omitting the references in the section in the earlier Act to a surviving spouse, the reason for this, of course, being that the position of the spouse has already been dealt with in section 46 (1) of the Act of 1952. So far, then, the only alteration lies in the promotion of the surviving spouse. The new section 47 repeats the Act of 1925, but adds two further subsections, (4) and (5). It is to be observed that under subsection (3) of both Acts the statutory trusts are made applicable to any class of relatives of the intestate other than issue, so, if subsection (5) were omitted, the position under both statutes would be that descendants of uncles and aunts would take, whether or no an uncle or aunt survived the intestate. The added subsection (4) in the Act of 1952 was made necessary by the altered form of subsection (1), and is designed to fill a gap in cases where an intestate leaves, or does not leave, a member of "the class consisting of brothers or sisters of the whole blood "of the intestate and issue of brothers or sisters of the whole "blood of the intestate" in cases where no member of that class attains an absolutely vested interest, that is to say, attains 21 or marries under that age. It is to be noticed that here brothers and sisters and their issue are treated as one class. So far, no alteration in the law is made except as above referred to in the case of a surviving spouse.

The difficulty is caused by subsection (5). [His Lordship read subsection (5) of section 47 and continued:] It is suggested that by reason of the words "any member of that class, or issue of "any member of that class" it is impossible in this subsection to treat relatives and their issue as a composite class, as is done in subsection (4), and that the effect of subsection (5) is that if no member of the primary class—that is to say, in this case, uncles and aunts—survives, the intestate is to be treated as having died without leaving any of the composite class surviving. The result would be that if any uncle or aunt survives, then uncles and aunts and issue of uncles and aunts would take per stirpes as before, but if no uncle or aunt survives (as seems likely here) then their issue are all cut out. This is a result so capricious and absurd and, moreover, so contradictory of subsection (3), that the court is entitled to strain every nerve to avoid it.

It is to be observed first that the subsection apparently sets out to be declaratory of the law laid down by subsections (2) and (3). It is quite inappropriate to change the law by a section beginning with the words "It is hereby declared," or to declare the meaning of subsection (3) by altering it. It is true that subsection (5) is not altogether contradictory of subsection (3), for the statutory trusts will still operate in a case where any member of the primary class survives, but subsection (5) drastically cuts down the effect of the earlier subsection.

Moreover, as I observed at the beginning of this judgment, if this be the right construction, the heading in section 46 (1) (v) "Fifthly" will, in a case where no uncle or aunt of the whole blood survives, but there is a surviving uncle or aunt of the half blood, let in relations of the half blood at the expense of relations of the same degree of the whole blood. Moreover, if no brother or sister survives, issue of theirs will be excluded in favour of uncles and aunts and their issue.

The only expedient suggested to me by which this result might be avoided was that I should, in construing the subsection, ignore altogether the words "or issue of any member of "that class." The difficulty about this is, that if this be done there does not appear to be any effect to be given to the sub section. It is, however, as I have said, a declaratory section, and must be treated as inserted to clear up some doubt as to the meaning of subsections (2) and (3). I have not been able to see what doubt was raised by those subsections, or to find that subsection (5), ignoring the words I have just quoted, has any effect at all. It is said, therefore, that the court may only ignore or cut out words where to do so is to give the statute some effect which the court can see to have been intended, and that this process is not legitimate where it reduces the section from having some meaning, however absurd or capricious, to having no meaning at all. This is a formidable argument, but its effect is, I think, somewhat diminished by looking back to subsection (2), where, so far as I can see, (*a*) has no effect at all, the whole object of the section being effected by (*b*) and (*c*), so that one may strike out subsection (*a*) altogether without altering the effect of the statute. If this be right, it is a sorry comment on modern legislation.

The difficulty was not appreciated for some years after 1952, as appears from the fact that the article in the Third Edition of Halsbury published in 1956 under the title "Executors and "Administrators" assumes that the law as laid down by the Statute of 1925 remains in this respect unaltered by the Act of 1952. This is apparent from the table of distribution on intestacy appearing in volume 16 (at p. 496). The same assumption is implicit in rule 21 (2) of the Non-Contentious Probate Rules, 1954, under which, I suppose, the existing grant of letters of administration issued.

In the autumn of 1956, however, the difficulty was espied by what Lord Lindley, in *Rowlls* v. *Bebb*,[1] described as "the keen "eyes of an equity lawyer . . ." These words were, I understand, spoken of the late Mr. Percy Walters, whose mantle has fallen on counsel for the plaintiffs in the present case, for he disclosed his discovery to the profession in an article in The Conveyancer in September, 1956 (at p. 399), out of which, no doubt, the present summons arose.

A judge in these circumstances is confronted with a familiar dilemma: How far may he go in modifying the terms of a statute in order to make it conform to what he is convinced must have been the intention of the legislature? Mr. Buckley, for the Crown, argued that to ignore the offending words here would be an instance of legislation by construction, and that it is for Parliament to repair the blunder if there be one. Maxwell on the Interpretation of Statutes has much to say on this topic, notably the words of Sir Francis Bacon (wrongly there styled

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[1] [1900] 2 Ch. 107, 115.

Lord Bacon, a title he never had) in these words: "Non est "interpretatio, sed divinatio, quae recedit a litera" ("Advance-"ment of Learning," cited in Maxwell, 10th ed., p. 258). Mr. Buckley contended that to ignore words is only legitimate in order to make sense of what is otherwise nonsense, that here the subsection as it stands has an effect not absolutely repugnant to the rest of the statute, while, if the words be ignored, the subsection has no effect at all. Further, he says a treatment so drastic can only be justified where the court can see what the legislature did intend, whereas here no plain intention can be gathered. I feel the force of this line of reasoning, though it leads to a most lame and impotent conclusion. As Maxwell pungently has it (at p. 7, op. cit.): "The difficulty lies in deciding "between words that are plain but absurd, and words that are "so absurd as not to be deemed plain." On the whole, I have come to the conclusion that I am entitled to ignore the words "or issue of any member of that class," or, rather, to treat them as not binding me to construe the word "class" in the earlier part of the subsection as confined to the primary class of aunts and uncles. I take this course because I am convinced that Parliament, in laying down rules for ascertaining next-of-kin, cannot have intended to promote those more remote over those nearer in blood. I decline to come to a conclusion which would necessitate holding that first cousins twice removed might be preferred to nephews and nieces.

The authorities are well summed up in Maxwell (at p. 252) in these words: "It has been asserted that no modification of "the language of a statute is ever allowable in construction "except to avoid an absurdity which appears to be so not to the "mind of the expositor merely, but to that of the legislature, "that is, when it takes the form of a repugnancy. In this case "the legislature shows in one passage that it did not mean what "its words signify in another, and a modification is therefore "called for, and is sanctioned beforehand, as it were, by the "author. But the authorities do not appear to support this "restricted view. They would seem rather to establish that the "judicial interpreter may deal with careless and inaccurate words "and phrases in the same spirit as a critic deals with an obscure "or corrupt text, when satisfied, on solid grounds, from the "context or history of the enactment or from the injustice, incon-"venience, or absurdity of the consequences to which it would "lead, that the language thus treated does not really express the "intention and that this amendment probably does."

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A number of cases were cited to me, but each of them is only useful to illustrate the principle which perhaps was best expressed by Lord Wensleydale in *Grey* v. *Pearson*[2] in these words[3]: " In construing wills and indeed statutes, and all written " instruments, the grammatical and ordinary sense of the words " is to be adhered to, unless that would lead to some absurdity, " or some repugnancy or inconsistency in the rest of the instru- " ment, in which case the grammatical and ordinary sense of the " words may be modified, so as to avoid that absurdity and " inconsistency, but no farther."

In my judgment, therefore, the answer to Question 1 of the originating summons should be in the terms of paragraph (a).

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co. for Wade & Co., Bradford; Treasury Solicitor.*

I. G. R. M.

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[2] (1857) 6 H.L.C. 61.

[3] Ibid. 106.

In re HODGE'S POLICY.
HODGE *v.* INLAND REVENUE COMMISSIONERS.

C. A.

1957
Nov. 12, 13.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1956 H. No. 408.]

Revenue—Estate duty—Property chargeable—Property deemed to pass —Insurance policy—" Wholly kept up . . . for the benefit of a " donee . . ."—" Kept up "—All premiums paid 34 *years before death of assured—Policy partly mortgaged to insurance company— Whether duty payable on whole of policy moneys—Customs and Inland Revenue Act,* 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38 (2)*—Customs and Inland Revenue Act,* 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11 (1)*— Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*c*).

On November 12, 1912, the plaintiff's father effected a policy of assurance on his own life in the sum of £10,000. On September 12, 1913, the assured executed a voluntary settlement assigning the policy to trustees on trust for his son, the plaintiff, on attaining the age of 25. The premiums on the policy were duly paid by the assured in 1913, 1914, 1915 and 1916, when the policy became fully paid up. In 1935 the policy was mortgaged by the plaintiff to the insurance company with whom it was effected to secure a loan of £1,000, with the promise to lend a further £4,000 on demand. The son attained 25 in 1938. On the death of the assured in 1950 the gross amount payable under the policy was £16,675, but as the debt outstanding to the insurance company amounted to £5,431, the net amount receivable by the plaintiff was £11,244. The Crown claimed duty on the whole of the policy moneys as being "money "received under a policy of assurance . . . wholly kept up by [the "assured] for the benefit of a donee . . ." within the meaning of section 11 (1) of the Customs and Inland Revenue Act, 1889, and, by reference to section 38 of the Customs and Inland Revenue Act, 1881, property deemed to pass on the death under section 2 (1) (*c*) of the Finance Act, 1894 [1]:—

Held, that in determining whether a policy "is wholly kept up" for the purpose of section 11 (1) of the Act of 1889, the period of time which it was relevant to consider was the period after the date of the assignment, because the expression "is partially kept up" as used in this provision had been decided by the House of Lords to mean, in effect, "has been partially kept up," and the expression "is wholly kept up" in the earlier part of the same paragraph should be similarly construed to refer to the past tense; accordingly, shocking though it appeared to be, the claim to duty succeeded because after the date of the assignment the policy had been wholly kept up by the assured for the benefit of the donee, his son.

Lord Advocate v. *Inzievar Estates* [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424 and *In re Oakes' Settlement* [1951] Ch. 156; 66 T.L.R. (Pt. 2) 831; [1950] 2 All E.R. 851 applied.

Observation of Lord Wright in *Barclays Bank Ltd.* v. *Attorney-General* [1944] A.C. 372; 60 T.L.R. 531; [1944] 2 All E.R. 208 explained.

Decision of Harman J. [1957] Ch. 339; [1957] 2 All E.R. 219 affirmed.

APPEAL from Harman J.

On November 12, 1912, Rowland Frederic William Hodge (later Sir Rowland Hodge) took out a policy on his own life, to commence from September 14, 1912, with the Royal Insurance Co. in a sum of £10,000 with profits. The first premium, £1,475, was duly paid by Sir Rowland on the signing of the policy. The subsequent premiums were to be paid annually on September 14 over the next four years, namely, 1913, 1914, 1915 and 1916. These were paid by the assured and the policy became a fully paid policy in 1916, so that thereafter there was no further obligation on the part of the assured or anyone else to make any further payment to the insurance company, but that company was bound to pay the stipulated sum on the death of Sir Rowland. By an instrument dated September 12, 1913, the assured assigned the policy to trustees on a voluntary settlement in favour of his son, the plaintiff in these proceedings, Sir John Hodge. Under that settlement the trustees were to get in the policy moneys on the death of the assured, and to hold them or investments representing the same in trust for the plaintiff on his attaining 25 years absolutely. The settlement contained a power to advance to the plaintiff while he was under 25 up to one moiety of the insurance moneys.

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[1] Finance Act, 1894, s. 2: "(1) "Property passing on the death of the "deceased shall be deemed to include "the property following, that is to "say:—. . . (*c*) Property which would "be required on the death of the "deceased to be included in an "account under section 38 of the "Customs and Inland Revenue Act, "1881, as amended by section 11 of "the Customs and Inland Revenue "Act, 1889 . . ."

Customs and Inland Revenue Act, 1889, s. 11 (1): "Section 38 (2) of "the Customs and Inland Revenue "Act, 1881, is hereby amended, as "follows:—. . . The charge under "the said section shall extend to "money received under a policy of "assurance effected by any person "dying on or after the first day of "June 1889, on his life, where the "policy is wholly kept up by him for "the benefit of a donee, whether "nominee or assignee, or a part of "such money in proportion to the "premiums paid by him, where the "policy is partially kept up by him "for such benefit."

The plaintiff became absolutely entitled to the policy and the moneys secured by it on May 1, 1938, when he attained the age of 25 years. Before that event, by an agreement made between himself, his father, the trustees and the insurance company, on April 17, 1935, he agreed to assign the policy by way of mortgage to the company for a consideration of £1,000 then lent, and a promise to lend a further £4,000 thereafter on demand. For that consideration the policy was deposited with the insurance company as security with the consent of Sir Rowland, who was then still interested in the policy moneys under a resulting trust in case his son should not attain 25.

The mortgage was duly increased to its maximum of £5,000 and was outstanding at the death of the assured on September 21, 1950, about 34 years after the last premium had been paid. The gross amount then payable by the insurance company on the policy was £16,675. The mortgage with interest amounted to £5,431; the net amount receivable by the plaintiff therefore was £11,244.

The Revenue claimed from the trustees of the settlement payment of estate duty upon the death of the assured on the amount payable on his death under the policy under section 2 (1) (*c*) of the Finance Act, 1894, enacted by reference to section 11 (1) of the Customs and Inland Revenue Act, 1889.[2]

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[2] See footnote 1, p. 240.

The plaintiff took out a summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, as a person who had reasonable grounds for apprehending that a demand might be made against him in respect of death duties on moneys paid under the policy.

The questions on the summons were: (1) Whether estate duty became payable on the death of Sir Rowland Frederic William Hodge on (a) the whole of the "money received under" the said policy of assurance, and (b) if not so payable on the whole of the "money" so "received," whether estate duty became payable on any share or part thereof and if so what share or part. (2) Whether the "money received" under the policy of assurance and chargeable with estate duty should be: (a) the whole of the said policy moneys, or (b) such policy moneys after allowing for any sum or sums paid prior to the death of the assured by the insurance company to the plaintiff and which (in the events which had happened) were not paid to, or "received" by, the plaintiff under the said policy.

Harman J. decided that estate duty was payable on the gross proceeds of the policy. The plaintiff appealed.

Roy Borneman Q.C., *Jackson Wolfe* and *M. T. Swift* for the plaintiff taxpayer. The charge to duty depends on the construction of section 11 (1) of the Customs and Inland Revenue Act, 1889, an amendment of section 38 (2) of the Customs and Inland Revenue Act, 1881, incorporated into the Finance Act, 1894, by section 2 (1) (*c*). In construing the section it is relevant to bear in mind the surrounding circumstances: *Keates* v. *Lewis Merthyr Consolidated Collieries Ltd.*[3] and *Asher* v. *Seaford Court Estates Ltd.*[4] The Board of Trade returns (which were laid before Parliament and of which, therefore, Parliament must be taken to have had knowledge) show that the present type of policy was not common in 1889.

The subsection refers to "running policies," that is, where there is a continuing liability to pay premiums right up to the date of the death. The time to which attention must be directed in seeing whether the subsection applies is the date of death. It has to be asked whether the policy is then "wholly kept up" by the donor for the benefit of a donee. The drafting is inelegant, but the words used plainly refer to the present tense and do not, and it is submitted were not intended to, apply to policies which

[3] [1911] A.C. 641; 27 T.L.R. 550.

[4] [1950] A.C. 508; 66 T.L.R. (Pt. 1) 943; [1950] 1 All E.R. 1018.

"have been kept up" in the past. If that had been intended, Parliament could easily have said so.

In *Barclays Bank Ltd.* v. *Attorney-General* [5] Lord Wright drew a distinction between running policies on the one hand and single premium policies or policies whose operation had been established once and for all by the payment of all the premiums so that all that had to be done was to wait for the event on which the policy matured. In the latter type of case, irrespective of whether the particular policy provides for a single premium or several, if the policy is paid up before the date of death, the subsection does not apply. The words are quite plain and the courts would be particularly unwilling to strain the meaning of statutory language in a case where the result of so doing would be unconscionable. The test is whether at the point of death the policy is then being wholly kept up by the assured so that only his death has prevented further premiums from being payable.

The charge to duty is on interests passing at the date of death. Nothing passed in this case, for the policy had been the absolute property of the son since 1938.

[ROMER L.J. The issue in *Barclays Bank Ltd.* v. *Attorney-General* [6] was whether a claim arose under section 2 (1) (*c*) or (*d*). Here it is (*c*) or nothing. Lord Wright's observations were directed to the case of the single premium policy, but that is sui generis.]

[LORD EVERSHED M.R. In any other case there is a continuing obligation for some period in order that the policy may mature. That is "keeping up" the policy.]

Looking at the matter in 1912, it would be fair to say that the donor in this case was paying a single premium policy by five instalments. This was a short term policy, but that could not have been said of the policy in *In re Oakes' Settlement.* [7]

It has been said that the construction put by the House of Lords in *Lord Advocate* v. *Inzievar Estates* [8] on "is partially "kept up," where it appears in the second part of section 11 (1), necessarily requires that "is wholly kept up" should be construed in a similar manner, that is, to refer to the past tense. But it is submitted that the construction is not in point, for the context is different and it is not necessary in order to give effect to the second phrase that the natural meaning of the phrase in the first part should be abandoned. The second part of the subsection is dealing with the case of a running policy which has been kept up partly by the donor and partly by others. The liability to duty is therefore less than if the donor had paid all the premiums, and to find out how much less duty is exigible it is necessary to see what proportion of the premiums were paid by the donor, and so attention has to be directed to what in fact happened from the date of the gift until the date of death. *Lord Advocate* v. *Inzievar Estates*[8] does not, therefore, assist. *In re Oakes' Settlement*[9] is not clearly reported. The case seems to have proceeded on the footing that there was a running policy, but it is not clear whether the point that the policy must be running was actually taken in that case.

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[5] [1944] A.C. 372; 60 T.L.R. 531; [1944] 2 All E.R. 208.

[6] [1944] A.C. 372.

[7] [1951] Ch. 156; 66 T.L.R. (Pt. 2) 831; [1950] 2 All E.R. 851.

[8] [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424.

This is an illogical Act in several respects and it is easier in such an Act to give different meanings to similar expressions. In this case there would be nothing incongruous in saying that no duty is chargeable, for the donor had parted out and out with the policy moneys many years ago. *Sanderson* v. *Inland Revenue Commissioners*[10] supports the view that the underlying vital assumption is the point of death and that no duty is chargeable except on property passing on the death.

Alternatively, it is submitted that even if duty is exigible, only the net amount of the policy moneys should be brought into charge and the mortgage moneys should be deducted because they were not " received " by the taxpayer. The subsection does not say " receivable " but " received." It is not relevant to consider what might have been the position if the mortgage had been to a third party and not to the insurance company. To the extent that the taxpayer has borrowed, the sum received by him is less than it would otherwise have been, but he could have surrendered the policy altogether, and had he done so (even on the day before his father died), it could not have been contended that any duty was payable.

Jackson Wolfe following. It is clear that the interest in the money receivable was throughout in the possession of the plaintiff. That follows from *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*.[11] The mortgage or charge existed in possession both before and after the assured's death and was, therefore, deductible: *Earl Cowley* v. *Inland Revenue Commissioners*.[12]

[8] [1938] A.C. 402.

[9] [1951] Ch. 156.

[10] [1956] A.C. 491; [1956] 1 All E.R. 14.

[11] [1953] A.C. 347; [1953] 1 All E.R. 403.

[12] [1899] A.C. 198; 15 T.L.R. 270.

That is reinforced by section 33 (2) (*b*), proviso (ii), of the Finance Act, 1954, which shows that such a deduction was impliedly given by the then existing legislation.

Lord Wright's observation in *Barclays Bank Ltd.* v. *Attorney-General*[13] was directed to the case where one premium "at "least" was payable. It is doubtful whether in 1889 payments once and for all would have been termed "premiums." Section 11 (1) of the Customs and Inland Revenue Act, 1889, which was incorporated into the Finance Act, 1894, by section 2 (1) (*c*), was an amendment of section 38 of the Customs and Inland Revenue Act, 1881, and should be construed with reference only to the objects of section 38 (1), being an interest which arises on an assured's death, or when annual sums for premiums ceased on that event. Keeping up a policy implies continuity.

Geoffrey Cross Q.C. and *E. Blanshard Stamp* for the Crown. The taxpayer's suggested construction of section 11 (1) ignores the emphasis in the subsection on "wholly" and "partially," which necessarily throw back to the past. The only case where a policy could be partially kept up by more than one person if regard were had to the point of death would be the case where the last premium paid was paid partly by the assured and partly by someone else, but *Lord Advocate* v. *Inzievar Estates*[14] shows that it was not that exceptional case which was in mind. Both expressions must be construed to refer to the past. Lord Maugham L.C. distinguished between premiums paid before the date of the gift and those between the date of the gift and the date when no further premiums were payable. Only the latter are relevant.

[LORD EVERSHED M.R. "Is" may be used in the sense of "shall have been," for the Act is referring to charges in the future after the Act has come into force.]

The liability to charge arises where there is found to be a policy which has been wholly kept up by the donor. It is conceded that *Lord Advocate* v. *Inzievar Estates*[14] is concerned with the different point whether account should be taken of who paid the premiums before the date of the gift, but the result in that case would not have been different if the policy had been one which had become fully paid up shortly before the death of the assured. The taxpayer's submission that one should look at the matter immediately before the death is inconsistent with the reasoning in that case. The proper test necessarily involves an historical inquiry as to what has been happening since the date of the gift.

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[13] [1944] A.C. 372.

[14] [1938] A.C. 402.

[ROMER L.J. It is against common sense to say that anything passed on the death of the assured in this case.]

But that could equally well have been said in *Lord Advocate* v. *Inzievar Estates*,[14] and it would be quite anomalous if, accepting the taxpayer's submission, there should be no duty payable in a case where, for example, a policy was kept up by the donor until only a very short period before he died.

[ROMER L.J. If the Crown's submission is accepted, it means that the liability to duty in respect of gifts of insurance policies continues not merely for five years but for an indefinite period. Because an unnatural meaning has been put on part of a section, it does not necessarily follow that it must be extended to the rest of the subsection.]

This policy was in fact "kept up" after the date of the gift. A single premium policy whose operation is established once and for all is distinguishable from policies providing for plurality of premiums. In the latter type of case, irrespective of how many premiums are provided for, the policy has to be "kept up." The taxpayer has submitted that this type of policy never came within the scope of the section at all because it did not have to be "kept "up." If so, duty would not have been exigible if the taxpayer had died, for example, in 1915. Alternatively, it was said that the section does not apply, because the premiums had ceased to be payable by the time that the assured died; but that is contrary to *In re Oakes' Settlement*,[15] for, even if the payments had not been commuted in that case, the policy would have been fully paid up by the time the assured died. It would be curious if the subsection should apply to a case where a payment was just about to fall due but not to one where the last payment had just been made immediately before the death of the assured.

[ROMER L.J. Lord Maugham L.C. in *Lord Advocate* v. *Inzievar Estates* [16] has put an interpretation on the language of the section which is wholly in favour of the Crown's submission and it is binding on this court. The Act requires one to look at the date of the gift and to see whether at that date the policy has been wholly kept up by the donor.]

[Counsel was not called on to argue the second and alternative point that, even if duty was exigible, only the net moneys actually received by the donee should be brought into charge.]

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[14] [1938] A.C. 402.

[15] [1951] Ch. 156.

[16] [1938] A.C. 402, 407.

Borneman Q.C. in reply. Lord Maugham L.C.'s observations were directed to the case before him. He was considering what proportion of the duty should be borne by the donee, and it was not in issue, as it is in the present case, whether the subsection applied at all. His construction should not be applied here to overrule the basic principle that the charge to estate duty under the Act of 1894 is by reference to interests passing on a death.

LORD EVERSHED M.R. The claim of the Crown for tax—that is, for estate duty—is founded upon section 2 (1) (*c*) of the Finance Act, 1894, and more particularly upon the language of section 11 of the Customs and Inland Revenue Act, 1889, which (by reference) is incorporated into the paragraph of the Finance Act. The question turns upon the language of the section in the Act of 1889 and, in the end of all, upon four words in it, namely, the four words "is wholly kept up." I should, however, read the part of the section more fully in which those four words occur. It provides as follows: "The charge under the said section"—that is, section 38 of the Customs and Inland Revenue Act, 1881—"shall extend to money received under a policy of "assurance effected by any person dying on or after June 1, "1889, on his life, where the policy is wholly kept up by him "for the benefit of a donee . . . or a part of such money in "proportion to the premiums paid by him, where the policy is "partially kept up by him for such benefit."

[His Lordship stated the facts and continued:] Upon attainment of the age of 25 the plaintiff became by the terms of the settlement absolutely entitled, without any qualification and without any obligation on his part, to the benefit of this policy, which for 22 years then had been fully paid up; and so he continued during the remaining 12 years of his father's life.

It would be difficult to imagine any species of property which had become more indubitably the plaintiff's without any limitation upon his right of any kind, sort or description; but it is nevertheless the claim of the Crown that upon the death of the assured, the plaintiff's father, estate duty is leviable upon the whole of the moneys payable under the policy upon the footing that that sum must be treated as part of the property passing on the father's death.

[His Lordship stated the facts as to the mortgage and continued:] It is a subsidiary question in the case whether the Crown, if entitled to tax at all under this section, is entitled to tax on the full figure which by the terms of the policy became payable, namely, £16,675, or only upon the balance which remained in fact receivable by the plaintiff, namely, £11,244.

I have already read the paragraph in the relevant section. The first and vital question is whether it can be said of this policy that it was one which "is wholly kept up" by the assured (the plaintiff's father) within the terms of the paragraph. In his judgment Harman J. said [1]: "There is no doubt "that here the plaintiff is a donee. There is no doubt that "nobody paid any premium on this policy except the assured "himself. But equally there is no doubt that no premium has "been paid or payable since the year 1916. It comes as a "shock that a policy which has been fully paid for over 40 years" —that was, perhaps, a slight overstatement, though it had been fully paid since a date more than 40 years ago—"and has "therefore not needed any keeping up during the whole of that "time, and in respect of which there has been nothing to do "but wait for the death of the assured, should now attract duty "although no beneficial interest in it passes from anybody to "anybody else on the death. It has belonged absolutely to the "plaintiff since 1938, 12 years before his father died: it is a "striking thing that duty should be exigible in such circum-"stances. On the other hand, there seems to be no doubt that if "this had been what is called an ordinary whole life policy and "the premiums had been payable periodically at dates continuing "up to the death of the assured the last paragraph of section "11 (1) in the Act of 1889 added by the Act of 1894 must have "caught it."

I associate myself entirely with all that I have read from that judgment. There is no doubt about the facts of which the judge said that there was no doubt, and it is to me no less shocking than it was to him that in such a case duty should be exigible, as upon a passing on the death of the assured, on the sums payable under this policy.

Still, to be shocked is not to make a useful advance towards the solution of the problem presented to the court. If the language of the section imposes the duty, then it is the section and Parliament which have done the shocking thing, and it will likewise be for Parliament and the legislators of today, if they suffer a similar shock, to alter the law.

I have said that the vital question is: was this policy one of which, within the terms of the section, it could be said at the relevant date, whatever it be, "It is a policy which is wholly "kept up by the assured"? The use of the present tense in that context is obviously somewhat inelegant on any view of it; and, indeed, Lord Macmillan, in a case to which I shall presently come,[2] drew attention to the inelegance of the section.

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[1] [1957] Ch. 339, 344; [1957] 2 All E.R. 219.

If the date which is being contemplated is the date of or immediately before the death of the person dying, then one is at once placed in somewhat of a difficulty if it is asked at that point of time: "Is the policy kept up?" If what is meant is "Is it effective?", that, of course, would be answered without any necessary reference to the question whether any premiums had been payable for years. If it means "Is the policy one "under which all the premiums have not been paid?" then it is a curious way of expressing that idea to use the words "is "kept up"; though, as will presently appear, it is the foundation of Mr. Borneman's argument that the test presented by the section is whether at that date (that is, immediately before the assured's death) the policy is one which still requires premiums periodically to be paid, whether the policy is what he calls "a "running policy."

But in my judgment, as Mr. Cross pointed out, the initial difficulty which I have adumbrated is much increased by the use of the adverbs "is *wholly* kept up," and again at the end of the paragraph, "is *partially* kept up."

Let me try to apply the kind of test which Mr. Borneman sought to impose and ask of a policy immediately before a death: is it at that date *wholly* kept up? Does it mean that at that particular date the assured, the donor, is going to pay the next premium or has paid the last one? Or does it refer to other premiums which previously fell due and had been paid? And if one poses the same sort of question in regard to the formula "is partially kept up," does it mean that the next premium will be paid or that the last premium has been paid partly by the donor and partly by the donee? Or does it bring into account, so to speak, past premiums, some of which have been paid exclusively by one party and some exclusively by the other?

Now this last question that I have put has, as I think, been conclusively answered for this court by the House of Lords; and, having regard to that answer and to the reasoning on which it was founded, I think, as did the judge in the court below, that

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[2] *Lord Advocate* v. *Inzievar Estates* [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424.

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it would be impossible for this court to say in the present case that, because here one is dealing with a policy which only required four or five premiums to be paid after the date of its coming into existence and because all those premiums long since have been paid, therefore it is on its facts sufficiently distinct from the decision of the House of Lords to which I have alluded to permit us to decide this case in the appellant's favour. So to do would, in my judgment, be to decide the case in a sense and, so far as I can see, upon the basis of reasoning which would not be consistent with the reasoning in the House of Lords case. At best it would create an extremely fine distinction; and, in my judgment, if distinctions of that kind are going to be made they should be made by the House of Lords and not by this court.

Mr. Borneman, in founding his argument upon the view that any policy within the contemplation of this paragraph must be what he called " a running policy " (a phrase which I have tried previously to define), invoked certain language of Lord Wright in *Barclays Bank Ltd.* v. *Attorney-General.*[3] That was a case which arose under this section of the Act of 1889, though the point was quite a different one from the point with which we are concerned. There the settlor, the assured, had assigned policies of assurance which he had effected on his own life to trustees for the benefit of his son, but he had also endowed the trustees with the means of keeping up the policies, because he had transferred investments to the trustees and under the terms of the trust the trustees were bound to apply the funds in their hands in paying the premiums. The question was whether in those circumstances the donor, the settlor, was himself paying the premiums, was himself " keeping up " the policy, or whether it was not the donor but somebody else, namely, the trustees, who were so doing.

Let me say at once that it was a case in which the premiums continued to fall due for payment right up to the date of the death of the assured, so that there is again no doubt this distinction between the facts in the *Barclays Bank* case [3] and the facts in this case.

The House of Lords took the view which Luxmoore L.J., in a dissenting judgment in this court, had taken,[4] namely, that in truth the donor, the settlor, was not paying the premiums and therefore was not keeping up the policy, because it was the trustees who were doing both those things.

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[3] [1944] A.C. 372; 60 T.L.R. 531; [1944] 2 All E.R. 208.

[4] [1943] K.B. 721; sub nom. *Attorney-General* v. *Barclays Bank Ltd.*, 59 T.L.R. 358; [1943] 2 All E.R. 123.

In the course of his reasoning, however, Lord Wright used this language [5]: "I do not need here to recapitulate in detail "the terms of the material settlements and the appointment. "They are fully analysed by Luxmoore L.J. in his judgment. "On these dispositions the first Lord Devonport, the settlor, did "not himself in the ordinary sense of the word, pay the "premiums necessary to keep the policies alive. The trustees "paid them. I think that 'keeping up' a policy according to "the ordinary use of language connotes payment of the premiums, "which is the normal method of keeping up a policy. This "generally involves periodical payments, and, though a single "premium policy is not unknown, that would have the effect "not so much of keeping up a policy as establishing its operation "once and for all. The Act did not, apparently, contemplate this "contingency, but, however that may be, the insertion of the "words 'in proportion to the premiums paid by him' is necessary to deal with the case where the deceased did not himself "wholly keep up the policy but only did so partially. In that "case the death duty is to fall on the deceased's estate in "proportion to the premiums paid by him."

It was the foundation of Mr. Borneman's argument, based on that language, that this section ceased to be applicable at all to a policy of which it could be said that "its operation had been "established," which, being interpreted, meant (according to Mr. Borneman) that all the premiums having been paid there only remained the obligation of the insurers upon the happening of the stipulated event to pay the sum insured. So, Mr. Borneman said, in this case once the four premiums after the first had been paid this policy was one of which its "operation "had been established." It no longer fell within the description of a policy which required any keeping up or which could be kept up, and so is outside the section altogether.

Let me say at once that I appreciate the argument and its attraction and, if it were sustained, the justice of the result in this particular case; but my first difficulty is that I cannot get so much out of the language of Lord Wright. When he was illustrating the meaning of the words "keeping up," he qualified his statement by observing that the case of a single premium policy was really sui generis and never was a policy which had to be kept up at all. In other words, I agree with Harman J. when he said: "That is a view"—referring to Lord Wright's language—" (obiter, I think) that a single premium policy would "not be caught by the Act because it is never 'kept up' at all. "I think it follows that if there are periodical payments by the "donor, whether two, three, or twenty-five, the policy can be "said to be kept up by the donor from the tax point of view."

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[5] [1944] A.C. 372, 378; 60 T.L.R. 531; [1944] 2 All E.R. 208.

I agree. I cannot extract any further assistance from the *Barclays Bank* case [6] and I turn at once to the other case which seems to me to have for us a concluding influence, namely, the case of *Lord Advocate* v. *Inzievar Estates*.[7] Again, let it be made quite plain that the point in the case was not the same as the point before us. There was not there involved the case of a policy all the premiums under which had been paid at some date before maturity. The question before the House was one under the latter part of the paragraph, a question of the proper apportionment of the premiums that had been paid from the date of the assignment by the settlor to the date of his death. The settlor appears to have paid four of the premiums after that date. The remainder had been paid by the donee.

It was suggested on behalf of the respondents that, in fixing the apportionment, one should have regard not only to the premiums paid since the assignment, but to all the premiums paid since the policy was first taken out; if one paid regard to the whole of the premiums paid since the policy had been taken out, then the proportion of the whole which the donee had paid was of course reduced. But it was the view of the House that one could only have regard to premiums which fell to be paid since the assignment.

I agree, of course, with Mr. Borneman that the point was a different one. Nevertheless, as I follow the case, the reasoning in support of the conclusion of the House negatives the view that the phrase "is partially kept up" has to be construed by looking at the point of time immediately before the death of the assured; because if one is going to look at that date then, prima facie, at any rate, it would follow that all the premiums payable under the policy from its inception could and should be taken into account. But the opinions proceeded on the view that the vital point of time to which attention must be drawn was the date of the assignment, and it seems to me inevitably to follow that, if one takes that point of time and then asks "In

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[6] [1944] A.C. 372.

[7] [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424.

" what proportion are the premiums paid? ", the answer to be given will not be essentially affected by the circumstance that all the premiums may stop or have stopped before the date of maturity of the policy.

That such was the reasoning is, I think, implicit beyond doubt in the language used particularly by Lord Maugham L.C. in his leading speech, and by Lord Macmillan. Let me take Lord Maugham L.C.'s speech first. He refers to the section and then says [8]: " I think the matter might be somewhat clearer if the " subsection were rewritten in the following expanded form: " ' The charge under the said section shall extend to moneys " ' received under a policy of assurance effected by a person on " ' his own life who shall die on or after June 1, 1889, not- " ' withstanding that he . . . shall have assigned the policy " ' gratuitously for the benefit of a donee.' " Then he sets out the remaining provisions in a form which makes, as he says, no assumptions as to its construction.

Then, after referring to *Lord Advocate* v. *Fleming*,[9] he said [10]: " Accordingly, where the donee has paid all the premiums " after the date of the assignment, no account duty is payable by " the donee under the Act. It follows that the first provision of " the section, as above expanded, can be clarified by making it " run thus: ' Where the policy after the date of a donation is " ' wholly kept up by the donor for the benefit of a donee, the " ' charge, etc.' By parity of reasoning, the second provision " may be read as follows: ' Where the policy after the date of a " ' donation is partially kept up by the donor for the benefit of " ' the donee, the charge ' . . ."

I will not take time by reading further from Lord Maugham L.C.'s speech, though Mr. Cross drew attention also (and I do not forget it) to a further passage [11]; but there is one passage in Lord Macmillan's speech which I would like to add to my citation from Lord Maugham L.C. He, also after a reference to *Lord Advocate* v. *Fleming*,[12] continued [13]: " In the second place, " all the premiums after the assignation may be paid by the " donor. The subsection applies, for the policy has after the " assignation been wholly kept up by the donor for the benefit " of the donee. In such a case the whole proceeds of the policy " are subject to duty. In the third place, as here, some of the

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[8] [1938] A.C. 407.

[9] [1897] A.C. 145; 13 T.L.R. 216.

[10] [1938] A.C. 402, 408; 54 T.L.R. 692; [1938] 2 All E.R. 424.

[11] [1938] A.C. 409.

[12] [1897] A.C. 145.

[13] [1938] A.C. 402, 412.

"premiums after the assignation may be paid by the donor and "some by the donee. Here also the subsection applies, for the "policy has after the assignation been partially kept up by the "deceased donor for the benefit of the donee." It was at the end of his speech that Lord Macmillan used the language [14]: "I appreciate the anomaly, but I fear that there is no reading "of this imperfectly drafted subsection which will avoid all "illogicalities."

Mr. Borneman said that those observations were merely obiter and that we could therefore disregard them. I cannot agree. It seems to me that the reasoning of the decision involved essentially the view that the vital date to which one must pay regard in seeking to apply the section is the date of the assignment; and, as I think, and as Lord Macmillan expressly said, it follows as a consequence that the words "is wholly kept up" and again the words "is partially kept up" must be translated as meaning "has been wholly kept up" and "has been partially "kept up" in each case from the date of the assignment.

Taking that view it seems to me that out of loyalty to the decision of the House (and I am not, of course, to be taken as doubting its correctness) this court must here hold, applying the same reasoning, that this is a case in which the policy "is "wholly kept up" by the donor because it has been wholly kept up, from the date of its assignment, by the donor. Put another way, the phrase "is wholly kept up by the donor" (inelegant though it be) means and fairly must mean "is a "wholly-kept-up-by-the-donor policy." That is, for the purposes of taxation, its essential quality. And I add that if the result in the present case is harsh, the other view, Mr. Borneman's view, would, as Harman J. pointed out, produce inevitably anomalies no less startling.

I do not forget that the actual decision in the *Inzievar* case [15] was based upon the last part of the paragraph, where the relevant words were "where the policy is *partially* kept up." But it would appear to me to be quite impossible to construe the words "is partially kept up" so far as is relevant in a different sense from the way in which one construes the earlier words in the same paragraph "is wholly kept up."

So far as the phrase "is partially kept up" is concerned, the actual case of a policy, all the premiums of which had been finally discharged, did come before my brother Romer sitting

[14] [1938] A.C. 402, 414.

[15] [1938] A.C. 402.

as a judge of first instance in *In re Oakes' Settlement.*[16] Harman J. thought that there had been some incorrectness in the reporting of my Lord's judgment in that case, and it is certainly not quite clear how the case was put, and what the points then argued or mainly argued by counsel for the taxpayer before my brother were, but Romer J. undoubtedly held that it was an irrelevant consideration, in considering the application of this part of the paragraph, that all the obligations by way of premium paying had been discharged some time before the death. Whether the report of the judgment is entirely correct or not, that much is clear and, in my view, and for the reasons which I have given, my Lord rightly so held.

For those reasons, therefore, I can see no escape from the conclusion at which Harman J. arrived.

The question remains whether the whole sum is chargeable or whether the taxpayer is entitled to deduct from the £16,675 the amount that was owing by the plaintiff in respect of the borrowed money. That turns again on the language of the section, and particularly the phrase "money received under a "policy of assurance."

I agree again with Harman J. that the money received under this policy of assurance was the sum assured—£10,000 plus profits, which was £16,675. That sum cannot be reduced by setting off what in fact, upon another account and by way of mortgage, the plaintiff owed to the insurers. As the judge pointed out, if the transaction had been in the form of a mortgage to a third party it would have been impossible for the plaintiff to have said otherwise than that the money received under the policy, for all of which he had to give a receipt, was the £16,675. I, therefore, am unable to agree that any legitimate deduction can be made on that account.

One other point was suggested by Mr. Borneman to which I should have earlier referred. There was evidence to show that at the date of the passing of the Act of 1889 statistics had been provided by the Board of Trade and had been laid before the House of Commons which showed to what extent policies of assurance were of the kind where premiums periodically were payable during the whole of the life assured, and to what extent the policies were in some different form providing for either single premiums or a limited number of premiums. It appears from those figures that the former numerically were very far in excess of the latter.

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[16] [1951] Ch. 156; 66 T.L.R. (Pt. 2) 831; [1950] 2 All E.R. 851.

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From those facts it was sought by Mr. Borneman to suggest that Parliament must have been intending only to deal with the common case and had excluded, and deliberately excluded, the uncommon case. If the language used by Parliament is ambiguous or doubtful, it is no doubt legitimate to inquire, by reference to the surrounding circumstances, what was the mischief which Parliament was seeking to amend, and to get some assistance from the answer to that question in construing the section. But I have been quite unable to see how in this case the presence of those figures can on any view assist in arriving at the conclusion for which Mr. Borneman contends. It leaves it all, so far as I can see, a matter of complete speculation. Are we to assume that Parliament or the legislatures—and one would have to include the legislatures in both Houses of Parliament and also the Sovereign who gave assent to the Bill—intended only to deal with certain types of insurance? I am bound to say that, if the proper view of the facts is that Parliament did so intend, then it seems to me inexplicable that they should have used the language which they did.

I can find nothing which can legitimately be invoked from those matters of fact that would entitle us to construe this paragraph so as somehow or other to exclude from its operation policies other than those which require periodic premium payments continuing up to the date when the policy matures.

For these reasons I think this appeal fails and must be dismissed.

ROMER L.J. I agree. This claim for duty appears to me to be wholly devoid of any merit at all, and it really is quite shocking to think that this policy should be liable to estate duty as representing property which was deemed to pass upon the death of the plaintiff's father. The father assigned it to trustees for the benefit of his son in 1913, and ever since 1938 that policy has been the sole, absolute and unqualified property of the plaintiff. It really is quite shocking to think that it should be treated as subject to duty under the Finance Act. In saying that, I am not in the slightest degree criticizing the Commissioners of Inland Revenue. Their function is to claim such duty as the Crown is properly entitled to, and if the property in question is liable to duty, as I think it is, then it is their bounden obligation to recover it for the Sovereign.

Mr. Borneman in his forceful and persuasive argument naturally relied very much on the word "is" in section 11 of the Act of 1889, where it says: " where the policy is wholly kept " up." He said that that present tense is indicative of the time when duty becomes normally payable, namely, the death of a deceased. He says: why should the court alter that word so as to read " is or has been " or " shall have been " in order to bring into the taxation net such a person as the plaintiff?

I would willingly give effect to that argument for my part if it was open to me to do so, but much to my regret it is not, and I think it is not for two reasons at least.

The first reason is that in *Lord Advocate* v. *Inzievar Estates* [17] Lord Maugham L.C. and Lord Macmillan expressed views which the Master of the Rolls has already referred to, which, as I think, make it quite impossible for this court to accept the argument of Mr. Borneman founded upon the word " is "; because both speeches show quite clearly that the use of the present tense merely results in this, that in ascertaining whether a particular policy has been wholly or partially kept up, the period of time which it is relevant to look to is the period after the date of the donation of the policy. I think nothing can be clearer than the way in which Lord Maugham L.C. expressed it when he said, in expanding the relevant language and putting it into inverted commas [18]: " Where the policy after the date of a donation is " wholly kept up by the donor for the benefit of a donee," and so on.

That view, which I may say was concurred in, as appears from the beginning of Lord Maugham L.C.'s speech, both by Lord Atkin and Lord Romer, is binding upon us and was echoed, as my Lord has already indicated, by Lord Macmillan in his speech.

It is true, as the Master of the Rolls has said, that in so far as their Lordships' observations were directed to the first part of the subsection, namely, dealing with the event of a policy being wholly kept up, the observations which they made may be regarded as obiter; but when one has all the members of the House of Lords (because Lord Thankerton agreed both with the opinion of Lord Maugham L.C. and with that of Lord Macmillan) expressing a view, if some different interpretation is to be put upon this language it must be put upon it by the House of Lords and not by this court.

The second reason why I do not think that we can accept Mr. Borneman's argument is that it is abundantly plain that the language which deals with policies which have been partially kept

[17] [1938] A.C. 402.

[18] Ibid. 408.

up by the deceased for the benefit of the donee, namely, "is "partially kept up," includes "or has been." That is quite manifest if one merely looks at the language alone, but at all events it has been decided by the House of Lords in the very case of *Lord Advocate* v. *Inzievar Estates*.[19]

I suppose one can conceive of cases where you put one interpretation on a phrase and another interpretation on the same phrase even if it appears in the same section, but it must be rare indeed. I think that, when it is so obvious that the word "is" in relation to partially paid premiums includes the past, then the same conception must be applied to cases where the policy is wholly kept up.

Accordingly, I think that for those two reasons and other subsidiary reasons, Mr. Borneman's argument, attractive though it was, cannot be accepted, at all events in this court. On all other points I entirely agree with what my Lord has said and I have nothing to add for myself.

ORMEROD L.J. I agree, and really the only thing I think I need say is that I too share the sense of shock which my brothers obviously have felt at the thought that the moneys receivable under this policy should attract estate duty in the way in which they have done on the death of the assured. I found Mr. Borneman's argument an attractive one and one to which, for my part, I would have been glad to be able to accede, but for the reasons which have been fully set out in the judgments of the Master of the Rolls and Romer L.J., I, too, feel that it is quite impossible to distinguish the present case from that of *Lord Advocate* v. *Inzievar Estates*.[19] I agree that the appeal must fail.

Appeal dismissed.

Solicitors: *J. D. Langton & Passmore; Solicitor of Inland Revenue.*

E. D.

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[19] [1938] A.C. 402.

In re McNEILL, DECD.
ROYAL BANK OF SCOTLAND *v.* MACPHERSON AND OTHERS.

C. A.

1957
Oct. 3, 4,
7, 29.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1956 M. No. 3058.]

Revenue—Estate duty—Contribution to—Deferred pecuniary legacies—"Free of duty"—Liability to estate duty—Prior successive life interests—Whether legatees liable to contribute towards duty paid on the first death—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 8 (4), 9 (1), 14 (1).

Will—Construction—"Free of duty."

Court of Appeal—Argument not raised below—Notice of appeal—Amendment of notice.

By his will dated March 23, 1934, a testator gave his residuary estate to his trustee on trust for sale and conversion in the usual form and directed his trustee to divide the trust estate into two moieties. One moiety was to be held on trust to pay the income to the testator's brother A. for life free of duty, and the income of the other moiety was to be paid to the testator's sister E. during her life free of duty. On the death of either, the income of the moiety concerned was to go over to the survivor during his or her life free of duty. Subject to these life interests, the trustee was to pay certain pecuniary legacies "free of duty" and subject thereto "and to the duty thereon" to pay the residue to named persons. The testator died in 1935, A. died in 1947 and E. died in 1956:—

Held, (1) that on the true construction of the will the expression "free of duty" in relation to the deferred pecuniary legacies related only to legacy duty and was not apt to exempt the legatees from liability to pay estate duty.

In re Turnbull [1905] 1 Ch. 726 and *In re Snape* [1915] 2 Ch. 179 considered.

(2) That as regards the estate duty chargeable on A.'s death in respect of his moiety of the trust fund and the legacies payable out of it, there was no liability imposed on the legatees by statute or by the terms of the particular will, nor was there any equitable principle which would require them to make any contribution.

Berry v. *Gaukroger* [1903] 2 Ch. 116; 19 T.L.R. 445 and *In re Hicklin* [1917] 2 Ch. 278; 33 T.L.R. 478 distinguished.

In re Charlesworth's Trusts [1912] 1 Ch. 319 disapproved.

In re Viscount Portman (*No. 2*) [1925] Ch. 294 considered.

Decision of Upjohn J. varied.

APPEAL from Upjohn J.

The following statement of the facts is taken from the judgment of the court.

Neil McNeill (hereinafter called "the testator") by clause 14 of his will dated March 23, 1934, made a residuary devise and bequest in favour of his executor and trustee, the Royal Bank of Scotland, upon trusts for sale and conversion in the usual form. There followed a direction that his trustee should out of the proceeds of sale pay his funeral and testamentary expenses "including all estate duty leviable at my death in "respect of my residuary estate" and "debts and the general "legacies bequeathed by this my will . . . and all death duties . . . "which . . . by virtue of any direction or devise or bequest free "of duty contained in this my will . . . are payable out of my "general personal estate." The testator then directed that his trustee should divide his trust estate into two moieties and (by subclause (1)) should hold one moiety upon trust to pay the income to his brother (hereinafter called "Alexander") "during "his life free of duty," and after his death to pay the income to his sister (hereinafter called "Eila") if she survived Alexander (as she did) "during her life free of duty." Subject to these life interests, that is, in the events which happened, upon Eila's death, the testator directed the bank to pay "free of duty" certain pecuniary legacies amounting in all to £53,000 and subject thereto "and to the duty thereon" to divide the moiety of the trust estate equally between certain named relations. By subclause (2) the testator made provision as regards the other moiety of his trust estate corresponding in all respects to the provision in subclause (1), save that the life interests in favour of Alexander and Eila were reversed in order, and so that the legatees above mentioned received additional legacies of like amount as those already given. The testator died in 1935, his brother Alexander in 1947, and Eila in 1956.

The trustee of the will took out a summons asking, inter alia, whether the pecuniary legacies were to be paid subject to deduction of a rateable proportion of the estate duty leviable on the passing of the first moiety on the death of Alexander and of both moieties on the death of Eila, having regard to the direction in the will that the legacies were to be paid "free of duty"—which it was conceded was the sole ground on which exemption could be claimed, if at all.

Upjohn J. decided that in the context of the will (the relevant clauses of which are set out in the judgment of the Court of Appeal) the direction to pay the legacies "free of duty" was intended to apply only to exemption from legacy duty (which duty had been abolished since the date of the will by the Finance Act, 1949, s. 27). He, accordingly, declared that the legacies payable out of the sister's fund should be paid subject to a deduction of a rateable proportion of the estate duty chargeable on her death.

He further declared that as regards the legacies payable out of the brother's fund, payment should be subject not only to duty leviable on the death of the sister, but also of the duty which had been paid on the death of Alexander.

The person appointed to represent the pecuniary legatees appealed.

The argument on the first question, that is, whether on the true construction of the will the expression "free of duty" was apt to free the deferred pecuniary legacies from estate duty, or whether it applied only to legacy duty, appears sufficiently from the judgment of the court and does not call for report.

The second question, that is, whether the legatees whose legacies were payable out of the brother's fund were liable to contribute not only towards the duty leviable on Eila's death but also the duty which had been paid after the death of Alexander, was not raised on the notice of appeal but leave was given to amend the notice.

R. Cozens-Hardy Horne for the first defendant, Anna Elizabeth MacPherson, representing the persons entitled to the deferred pecuniary legacies. If the legatees were not exempt from liability to pay estate duty by the terms of the will, they are admittedly liable to contribute rateably towards the duty leviable on the death of Eila: *Berry* v. *Gaukroger*.[1] But *Berry* v. *Gaukroger*[1] turned on section 8 (4) of the Finance Act of 1894, which, as regards such of the property passing on the death as is property for which the executor is not accountable, imposes on those persons to whom the property passes for a beneficial interest in possession liability to contribute towards the duty. In the present case the legacies were not payable until Eila died. In *In re Charlesworth's Trusts*[2] Joyce J. said that there was no essential difference between the case before him and *Berry* v. *Gaukroger*,[3] but he appears to have overlooked the significance of the fact that in the case he was trying the legatees did not become entitled to a beneficial interest in possession until the wife died: see the criticism of *In re Charlesworth's Trusts*[4] by Romer J. in *In re Viscount Portman (No. 2)*.[5] In the event Romer J. followed

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[1] [1903] 2 Ch. 116; 19 T.L.R. 445.

[2] [1912] 1 Ch. 319.

[3] [1903] 2 Ch. 116.

[4] [1912] 1 Ch. 319.

[5] [1925] Ch. 294.

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In re Charlesworth's Trusts,[6] but did so on a point which has no application here, namely, that there the fourth viscount was liable to contribute under section 14 (1) of the Act of 1894,[7] because "entitled" in that section meant, as Joyce J. had treated it as meaning, "entitled at any time." Section 14 (1) does not apply here, for the legacies do not constitute a charge on the fund. *In re Viscount Portman (No. 2)*[8] is further distinguishable in that in that case there was an outstanding claim for duty unpaid when the fourth viscount came into possession. In the present case the duty leviable on the death of Alexander was paid long ago and no charge now subsists under section 9 (1). In *In re Viscount Portman (No. 2)*[8] on the death of the second viscount the fourth viscount became entitled at some time in the future to the rentcharge, but in the present case the legacies were contingent until Eila died, for it was not known whether there would be sufficient residue to pay them.

John Bradburn for the second, third, fourth and fifth defendants, personal representatives of one of the persons entitled to residue. The general rule is that in the absence of words conferring exemption, estate duty on property not passing to the executor as such, and, therefore, property on which the duty is charged, is borne rateably by the persons becoming ultimately entitled to the property. The persons who will be entitled eventually and amongst whom the liability to pay duty is to be rateably divided will not necessarily be ascertainable at the date of the death, because they may not have become entitled on that death. It has been conceded on behalf of the legatees that, applying the principle in *Berry* v. *Gaukroger*,[9] where there is only one life tenant, when he dies the burden of estate duty payable on that death is borne rateably amongst the beneficiaries in the fund. The intervention of a second life tenant makes, however, no difference in the end, for although in such a case the *Berry* v. *Gaukroger*[9] principle does not operate on the first death (for the reasoning on that case is founded on section 8 (4)), and at that time the only person to whom it could apply is the second life tenant, the property is charged with the payment of the duty under section 9 (1) and that charge is borne rateably by the persons who eventually become entitled to the capital of the fund: *In re Hicklin.*[10]

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[6] [1912] 1 Ch. 319.

[7] Finance Act, 1894, s. 8 (4): "Where property passes on the death "of the deceased, and his executor is "not accountable for the estate duty "in respect of such property, every "person to whom any property so "passes for any beneficial interest in "possession, and also, to the extent "of the property actually received or "disposed of by him, every trustee, "guardian, committee, or other person in whom any interest in the "property so passing or the management thereof is at any time vested, "and every person in whom the same "is vested in possession by alienation "or other derivative title shall be "accountable for the estate duty on "the property, and shall, within the "time required by this Act or such "later time as the commissioners "allow, deliver to the commissioners "and verify an account, to the best "of his knowledge and belief, of the "property: provided that nothing in "this section contained shall render "a person accountable for duty who "acts merely as agent or bailiff for "another person in the management "of property. . . ."

S. 9 (1): "A rateable part of the "estate duty on an estate, in proportion to the value of any property "which does not pass to the executor "as such, shall be a first charge on "the property in respect of which duty "is leviable: provided that the property shall not be so chargeable as "against a bona fide purchaser thereof "for valuable consideration without "notice. . . ."

S. 14 (1): "In the case of property "which does not pass to the executor "as such, an amount equal to the "proper rateable part of the estate "duty may be recovered by the person, "who being authorized or required "to pay the estate duty in respect of "any property has paid such duty, "from the person entitled to any sum "charged on such property (whether "as capital or as an annuity or otherwise), under a disposition not containing any express provision to the "contrary."

[8] [1925] Ch. 294.

Duty is leviable at the first death and is paid out of the fund as a whole, but the burden of it does not have to be apportioned until the fund itself becomes distributable, which in this case is after the second death. Then, when apportionment becomes a live issue, the persons entitled to the capital are ascertainable and the apportionment can be made.

[LORD EVERSHED M.R. But that puts a specific legacy on the same footing as a gift of an aliquot share of residue.]

That is the result of the cases. Although the legacies are expressed as a fixed sum, they must bear such a contribution as that sum bears proportionately to the total that is left as residue, and for this purpose there is no distinction between pecuniary legacies and aliquot shares. Estate duty is charged on the property by section 9 (1). Each beneficiary must bear a proportion of the duty, including that payable on the dropping of earlier lives.

[ROMER L.J. But if this is right, the second life tenant, or her estate, ought to be compensated for the reduction of income during her lifetime.]

The rateable contribution from the remaindermen does not arise until the capital becomes distributable. Nor is it a valid objection that the charge may have to be postponed for a long time, because the same applies to the remaindermen's interests.

[9] [1903] 2 Ch. 116.

[10] [1917] 2 Ch. 278, 283; 33 T.L.R. 478.

A person entitled "at any time" (see *In re Viscount Portman* (*No. 2*)[11]) includes a person not ascertainable till the death of the second life tenant.

Estate duty is a charge on the whole residue (*In re Parker-Jervis*[12]), and that charge is thrown by section 9 (1) of the Finance Act, 1894, proportionately on all persons interested in residue. If (despite the doubts expressed by Vaughan Williams and Cozens-Hardy L.JJ. in *Berry* v. *Gaukroger*[13]) the legacies are to be regarded as a charge on the residue, then they must bear a proportionate share of the estate duty under the express terms of section 14 (1): *In re Charlesworth's Trusts.*[14] The fact that there were two life interests makes no difference to the incidence of the charge. The decision in *In re Viscount Portman* (*No. 2*)[15] was cited in *In re Drake*[16] and no doubts were cast on it. *In re Viscount Portman* (*No. 2*)[17] was the case of a mortgage charged on the property but Romer J. nevertheless followed *In re Charlesworth's Trusts*,[18] where (as he thought) there was no charge. Sargant L.J.'s reference to *In re Charlesworth's Trusts*[18] in *In re Drake*[19] supports the view that legacies are a charge within section 14 (1) of the Finance Act, 1894.

R. Cozens-Hardy Horne in reply. The decision in *In re Charlesworth's Trusts*[20] is distinguishable on two grounds: (1) that decision turned on section 8 (4) of the Act of 1894; (2) it was assumed that if there was a charge, then estate duty had to be apportioned by virtue of section 14 (1). Here the legacies are not a charge, so section 14 (1) has no application. Here duty is not outstanding, so there is nothing to apportion. There is nothing in *In re Drake*[21] which suggests that an apportionment should be made in this case. There is no general equitable principle which requires the duty to be apportioned.

J. A. Wolfe for the trustees.

Cur. adv. vult.

October 29. Romer L.J., reading the judgment of the court, stated the facts set out above and continued: The questions which now call for determination concern the incidence of the estate duty which became leviable upon the passing of the first moiety of the trust estate on the death of Alexander and of both moieties on the death of Eila. It has been contended on behalf of the residuary legatees and was conceded before Upjohn J. that unless they were exempted by the direction "free of duty" which we have quoted, the legatees would be bound to pay, or suffer by way of deduction, a part of both sums of estate duty calculated in accordance with the proportion which the legacies bore and bear to the moieties of the trust estate. The extent to which this contention, according to the general law, is well founded is dealt with later in this judgment. We deal first with the effect of the formula "free of duty" and with the contention of Mr. Cozens-Hardy Horne on behalf of the first defendant, Anna Elizabeth MacPherson (who had been appointed by the order of the judge to represent all the pecuniary legatees), that such formula upon the true construction of this will operates to discharge the legatees from all liability to contribute in any way to those sums of estate duty. It will be appreciated that by virtue of the Finance Act, 1949, s. 27, legacy duty had ceased to be chargeable in respect of the legacies with which we are concerned before the date when they became payable, namely, on the death of Eila. At that date the only death duty exigible in respect of any part of the testator's estate was the estate duty already mentioned; and the same was true also at the date of the death of Alexander, since the legacies were not then payable.

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[11] [1925] Ch. 294, 310.
[12] [1898] 2 Ch. 643.
[13] [1903] 2 Ch. 116, 130, 134.
[14] [1912] 1 Ch. 319.
[15] [1925] Ch. 294.
[16] [1926] Ch. 559, 563, 571, 572.
[17] [1925] Ch. 294.
[18] [1912] 1 Ch. 319.
[19] [1926] Ch. 559, 572.
[20] [1912] 1 Ch. 319.
[21] [1926] Ch. 559.

It was the main premise of Mr. Horne's argument that the formula "free of duty," in the absence of some special or limiting context, means "without any deduction (therefrom) by "reason or in respect of death duty"; that is to say, it imports freedom from all kinds of death duties which might otherwise have the effect of diminishing the gift. This proposition was founded on such cases as *In re Turnbull*,[1] before Farwell J., and *In re Snape*,[2] before Eve J.

In the former case the question particularly arose in regard to settlement estate duty which was chargeable in respect of certain legacies in addition to legacy duty. Farwell J. said[3]: "I do not see how I can spell out of that anything other than "what it says, namely, that the legacy is to be paid free from "duty. The settlement estate duty is charged upon the legacy, "no doubt, in a sense, but the executors have to pay it before "they pay over the legacy, and they do so as a matter of practice. "Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy.

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[1] [1905] 1 Ch. 726.

[2] [1915] 2 Ch. 179.

[3] [1905] 1 Ch. 726, 732.

"I cannot myself see any reason for saying that 'free from duty' "means free from one kind of duty payable by the executors "more than from another kind of duty so payable."

The exact scope of formulae of this kind has been considered in relation to particular wills in many cases which have come before the courts, but it appears that the present is the first occasion on which it has been necessary to consider the effect of such exemptions (and also, indeed, strictly, the effect of the general law) in the case of deferred pecuniary legacies. To the general principle which Mr. Horne invokes from the cases of *In re Turnbull*[4] and *In re Snape*[5] two corollaries may here be mentioned. In the first place, it has been decided (see *In re Wedgwood*[6]) that in the case of a legacy given to trustees in trust for persons in succession the exemption conferred by the formula "free of duty" will prima facie be satisfied (and its effect exhausted) by freeing the gift from diminution for death duties when it is first severed from the estate and handed over to the trustees. No question of this kind, however, arises in the present appeal—though the testator did in fact give a settled pecuniary legacy by clause 9 of his will.

The second corollary is to the effect that since the will speaks prima facie from the death the exemption will ordinarily cover new death duties which may be imposed between the dates of the will and of the death; but may, on the other hand, not cover new death duties imposed after the date of the death: see *In re D'Oyly.*[7] This principle, again, is not directly relevant in the present case. On the other hand, as already observed, legacy duty which was operative in respect of the legacies given by the testator and payable on his death had ceased to be operative at the time when Eila died. It seems to us, as a matter of principle, plain enough that if upon the true construction of this will the exempting formula "free of duty" was apt and intended only to relieve the legatees from liability in respect of legacy duty (which was an existing tax at the date of the testator's will and death) then it would be wrong, simply because legacy duty had been abolished, to give to the formula an extended meaning in order that it might have some practical effect in favour of Mr. Horne's clients when their legacies became payable on Eila's death.

We are prepared to accept, at least for the purposes of this judgment, the correctness of Mr. Horne's general proposition founded on the cases of *In re Turnbull*[8] and *In re Snape*.[9] But it is trite law that in any given instrument the meaning of any form of words used therein must depend upon the context of that instrument and the guidance to interpretation which the instrument itself provides. It becomes necessary, therefore, to look somewhat closely at the testator's will as a whole. It will be observed at once from its form and language that the will was the product of a skilled professional draftsman. We think, therefore, that the interpretation of the phrase "free of duty" where used in the will must be judged against that background: and against the background of knowledge, which we think must be attributed to the draftsman, that at its date legacy duty and succession duty were operative as well as estate duty, and further that, by the general law, estate duty, though a charge upon real estate, is payable as regards personalty by the executors as part of their administration expenses.

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[4] [1905] 1 Ch. 726.

[5] [1915] 2 Ch. 179.

[6] [1921] 1 Ch. 601, 620.

[7] [1917] 1 Ch. 556.

By the first clause of the will the testator appointed the Royal Bank of Scotland his general executor and trustee and declared that the bank should be entitled to remuneration "free of duties" (plural) out of his estate in accordance with its relevant scale. Clause 2 contained an appointment of executors for the testator's East Indian property with a bequest to them of the proceeds of sale of that property "free of all duties (including estate duty) "leviable in England by reason of my death," which duties he directed to be paid as testamentary expenses. By clause 3 the testator devised his Norfolk freehold property, with an exception in favour of his gamekeeper, to his brother in fee simple, and he directed the bank to pay as testamentary expenses "all the duties "(including estate duty)" leviable at his death in regard to his Norfolk property and in exoneration thereof. The clause also contained a devise to the gamekeeper of the excepted cottage, expressed to be "free of all duties (including estate duty)," which were to be paid as part of his testamentary expenses. There followed in clauses 4, 5 and 6 a bequest of leasehold property to his sister and specific legacies to his sister and brother, all expressed to be "free of duty." Clause 7 contained a forgiveness of all debts due to the testator with a direction to the bank to pay as part of his testamentary expenses "all duties "(including estate duty)" leviable at his death in respect of any such indebtedness. Clauses 8 to 12 inclusive comprised pecuniary legacies, charitable and otherwise, one settled pecuniary legacy. and certain annuities. In each case the bequest was expressed

[8] [1905] 1 Ch. 726.

[9] [1915] 2 Ch. 179.

simply to be "free of duty." Clause 13 contained a declaration to the effect that if he had made any gift during his life in respect of which estate duty should be payable at his death, such duty was to be paid out of his personal estate as a testamentary expense. There followed then the residuary gift of clause 14 which we have already sufficiently cited.

The direction in clause 1 that the bank's remuneration should be "free of duties" may not perhaps for present purposes be of significance one way or the other—it may have been taken from some form provided by the bank. We are not presently concerned with the scope of the exemption intended, but observe none the less that the plural "duties" is used. Of much greater significance, in our judgment, is the language of clauses 2 and 3. Not only is the plural used in both cases—free of all "duties"—but express reference is made to the inclusion of estate duty. The same observation is applicable in regard to clause 7, even though, as pointed out in argument, the precise effect intended may be more doubtful. It will be noted also that by clause 13 express reference is made to estate duty in circumstances in which provision for such duty was plain and desirable. Finally, in the first paragraph of clause 14 there is again found the use of the plural "all death duties" in a context containing express reference to estate duty. In contrast to these provisions, the simple formula and the use of the singular "free of duty" is used in every case in regard to bequests (clauses 4, 5, 6, 8, 9, 10, 11, 12, and the subclauses of clause 14).

Where in a will of this elaborate character, to be judged against the background already mentioned, two distinct formulae are found, it seems to us that prima facie distinct meanings should be attributed to each: and where one formula, namely, the singular "free of duty," is on the face of it less comprehensive than the other, it would seem to follow that by the formula a more limited exemption was intended. It is true that in the first paragraph of clause 14 the reference to all death duties (in the plural) is followed by the language: "and other moneys "which under . . . any direction or devise or bequest free of duty "contained in this my will . . . are payable out of my general "personal estate." But we are not satisfied that the use of the phrase "free of duty" in that passage can have the effect of equating in significance the two formulae. The words "free of "duty" in the passage just cited are part of a reference to a direction, to be found in several places in the will, for payment of the duty out of the general personal estate—a direction not, however, in fact found in any of the cases in which bequests are given free of duty.

But, in addition, it is important to observe, as did the judge, that the only duty to which any sensible reference could have been intended or made in any one of the cases of gifts "free of "duty" before you get to clause 14 must have been legacy duty: and in clause 14 itself the same is beyond doubt true of the two gifts of life interests to Alexander and Eila respectively. If the phrase "free of duty" in reference to the pecuniary legatees in this clause has the wider intention for which Mr. Cozens-Hardy Horne argues, then it would appear to be used in this one instance in a different sense from that in which it is used elsewhere throughout the will, including clause 14 itself.

Finally, we draw attention, as also did the judge, to the words in subclause 1 (*b*) of clause 14: "subject to the said "legacies . . . *and the duty thereon.*" Though it would be sensible and correct to speak of legacy duty being leviable *upon* legacies, the same would not really be true or sensible of the estate duty which it is contended the legatees would have to bear in the absence of exemption: for that estate duty is not a duty *upon* the legacies. It is a duty leviable upon or in respect of the whole estate, and the obligation of the legatees to suffer some part of the levy arises not by reason of any separate charge upon the legacies as such, but because the legatees (like those entitled to the residue) are entitled to receive their benefits out of a trust estate which itself must be diminished by the charge for estate duty.

In the context therefore, of this will, and having regard to its elaborate form and the selection of two distinct formulae, one wider in scope on the face of it than the other, we agree with the judge in thinking that the phrase "free of duty" in subclauses (1) and (2) of clause 14 was intended to apply only to exemption from legacy duty, and is not apt to exempt the legatees from liability to bear such proportion of the estate duty charges as the general law will otherwise impose upon them.

On that view of the matter, the question next to be considered is as to the liability of the legatees in respect of the estate duty which became leviable on the death of Alexander in 1947 and the further estate duty which fell to be paid on Eila's death in 1956. The provisions of the Finance Act, 1894, which are relevant to the determination of this question are section 8 (4), section 9 (1), and section 14 (1). They are as follows: [His Lordship read the sections and continued:] Inasmuch as Eila's legal personal representatives were not accountable for the estate duty which became payable on her death (for she only had a life interest in her own and in her brother's fund) it is clear that, by virtue of section 8 (4) of the Act, each legatee is accountable for a rateable part of that duty, ascertainable by reference to the value of his or her legacy, as being a person to whom property passed for a beneficial interest in possession; nor, indeed, was the contrary contended either before the judge or before this court. It was, however, assumed in the court below that unless the legatees were exempted from liability to estate duty by reason of their legacies having been given "free of duty," they should be charged not only with a rateable part of the duty which became payable on Eila's death but with a similar part of the duty which had become exigible, and had been paid, on the brother's fund, on the death of Alexander. Accordingly, and in default of argument upon the point, the judge declared "that the pecuniary legacies payable "out of the brother's fund ought to be paid subject to deduction "of a rateable proportion of the two sets of estate duty which "became payable in respect of the said brother's fund on the "death of Alexander McNeill (the brother of the testator) and "of the said Eila McNeill." The appellant did not in her original notice of appeal raise the point that if the judge were right in the limited effect which he had attributed to the words "free of "duty," the legatees were at all events not liable for any part of the estate duty which had become payable on the death of Alexander (hereinafter referred to as "the relevant duty"). During the discussion before us it was, however, suggested that an argument to that effect might well be advanced on behalf of the legatees, as alternative to their main contention. We accordingly gave leave to Mr. Cozens-Hardy Horne to amend his notice of appeal in order to raise the point, and this he did by introducing as an additional ground of appeal "that the judge "was wrong in law in holding that any duty payable in respect "of the said brother's fund on the death of the said Alexander "McNeill was chargeable against the pecuniary legacies payable "thereout on the death of the said Eila McNeill." This point was accordingly argued before us and it is, in our opinion, one of some little difficulty.

It is, we think, clear that if the pecuniary legatees are liable to be charged with any part of the relevant duty, it can only be (i) because there is some statutory provision to that effect, or (ii) because the testator expressed an intention by his will that the legatees should be so charged, or (iii) because of some principle of equity which imposes the liability.

As to the first of these grounds, it was not suggested that any statutory provision is relevant to the matter other than the sections of the Finance Act, 1894, to which we have already referred, viz., section 8 (4), section 9 (1) and section 14 (1). By reason of section 9 (1), the brother's fund clearly became charged upon his death with the estate duty which became payable in respect thereof, as being property which did not pass to Alexander's executor as such. That subsection, however, does no more than impose the charge; it does not indicate how the charge is to be borne as between the persons who are beneficially interested. Section 8 (4) of the Act specifies the persons who shall be accountable for the estate duty on property which passes on the death of a deceased person whose executor is not accountable for the duty, and there is included in the category "every "person to whom any property so passes for any beneficial "interest in possession." It is, we think, clear that the pecuniary legatees did not become accountable on Alexander's death under this subsection, for, in view of Eila's prior life interest in the brother's fund, it cannot be said that their legacies passed to them for a beneficial interest "in possession." It is true that on Alexander's death without issue the legacies became indefeasible, whereas they had previously been contingent, but a vested legacy payable in futuro is not a beneficial interest in possession. Nor, in our judgment, did the legatees become chargeable in respect of estate duty on Alexander's death by virtue of section 14 (1) of the Act. That subsection only applies where a person is entitled to any sum "charged on" property which does not pass to the executor as such. In our opinion, the legacies given to the first defendant and her fellow legatees were not charged on the brother's fund for the purposes of section 14 (1) of the Act or at all. The legacies were ordinary pecuniary legacies and would become payable in a due course of administration, but the legatees had no rights comparable, for example, to those attaching to a rentcharge.

It accordingly cannot be said, in our judgment, that if the legatees are liable at all to be charged with a rateable part of the relevant duty, they are so liable because of any of the provisions of the Finance Act, 1894. Is there, then, any indication of intention to be found in the testator's will that he intended them to be subject to this liability? Inasmuch as we have expressed the view that the words "free of duty" in the will were confined in their operation to freedom from legacy duty, it may be said that the testator impliedly evinced an intention that the legatees should not also enjoy exemption from any statutory or other liability to estate duty; and that he accordingly intended that they should bear a rateable proportion of the estate duty payable in respect of both funds on Eila's death in accordance with section 8 (4) of the Act of 1894. Subject, however, to that implication of intention, no guidance appears from the testator's will either one way or the other on the question which we are now considering; and certainly there is no indication that the testator intended to impose any duty on the legatees other than such as might be imposed by law.

It was contended before us, however, that even though no liability to contribute to the relevant duty is imposed either by statute or by virtue of any intention, express or implied, in the will, it should nevertheless be imposed on equitable grounds. Apart from authority, it is difficult to see why the legatees should be subjected to a rateable proportion of estate duty which became payable on a death which brought them no beneficial interest in possession. It was suggested, however, on behalf of the respondents, that every time a charge for duty arises on the cesser of a limited interest in a fund, that charge must be rateably borne, according to their respective beneficial interests, by all those amongst whom the fund ultimately falls to be distributed. Accordingly, so it is contended, if legacies are payable out of a fund on the falling in of the last of several successive life interests in the fund the legatees, when finally paid, must suffer a cumulative deduction in respect of the estate duty levied on the death of each life tenant. If this view of the matter be right, it would lead to curious results. In the first place, the argument involves a pecuniary legacy being relegated in those circumstances to the status of an aliquot fraction of the whole estate, which it is not. It is of the essence of a pecuniary legacy that it is paid first and the residue consists of what is left after the stated legacies have been paid; so here the testator directed that legacies of stated amounts should be paid out of the trust fund as it stood when Eila died, which is quite a different thing to bequeathing an aliquot part of that fund to each legatee on Eila's death. Again, it is difficult to understand why the suggested equity should be applied in the present case for the advantage only of the residuary legatees. During the period of Eila's survivorship of her brother she suffered a diminution of income by reason of the duty which the trustees paid out of the brother's fund on Alexander's death. If the alleged equity exists at all, it would surely have been fair to have applied it in such a way as to have benefited Eila as well as the residuary legatees; this could have been done by valuing the legacies as at Alexander's death and charging the legatees with an appropriate rate of interest on the amounts so ascertained as part compensation to Eila or her estate. Such a course would, however, involve considerable difficulties—which would, of course, have been enhanced had the legacies continued to be contingent after Alexander's death. Another curious position would have arisen, on the respondents' argument, if the testator had directed the trustees to raise and pay, during Eila's lifetime, the sum of £X for some specific purpose and had charged the sum on the funds; it would surely not be right to subject the legacies to a deduction in respect of this charge when they became payable on Eila's death.

Such considerations as we have mentioned suffice to show the difficulties—and indeed hardships—to which the suggested equity would give rise. Nor is it easy to define the equity, if it in truth exists. It is perfectly true that, generally speaking, if a fund is subject to a charge, the burden of that charge must be borne rateably by the persons among whom the fund is divisible in proportion to their respective beneficial interests: and, as was pointed out by Cozens-Hardy L.J. in *Berry* v. *Gaukroger*[10]: "it is an old and well-established principle of equity that, when "several persons are liable in respect of one and the same "obligation, the rights of the parties inter se are not affected "by the circumstance that one of those persons has been called "upon to discharge and has discharged the obligation." But at the time when the legacies in the present case became payable there was no charge on the brother's fund at all in respect of the relevant duty; that duty had long since been paid and the charge which had been imposed by section 9 (1) of the Finance Act, 1894, in respect of it had ceased to exist. Accordingly, the general principle to which we have referred has no application to the present question. No other principle was invoked to support the respondents' contention and, were the matter free of authority, we should have little hesitation in rejecting it; for it does not appear to be founded in reason, would occasion complication in the administration of trusts and would, in some cases at least, produce unfair results.

Mr. Bradburn, however, placed considerable reliance upon a decision of Joyce J. in *In re Charlesworth's Trusts*.[11] In that case a trust fund was settled on trust to pay the income thereof to the settlor for his life with remainder to his widow for her life, and on the death of the survivor then as to £10,000 as the wife should by will appoint, and the remainder of the fund was to fall into the testator's residuary estate disposed of by his will. Estate duty was paid on the fund on the death of the settlor in 1908. The widow survived him and died in 1911, having appointed the £10,000 by her will. Joyce J. held that the estate duty which had been paid in 1908 should be borne rateably by the appointees and by the settlor's residuary legatees. It is by no means easy to discover from the short judgment which he delivered what was the true ground of his decision. He stated that the decision of this court in *Berry* v. *Gaukroger*[12] applied, and that there was indeed no difference between that case and the case before him; but further he seems to have applied the principle of section 14 (1) of the Finance Act, 1894, notwithstanding that he was unable to hold that the £10,000 was a charge on the trust fund. In so far as we apprehend the reasons for the decision (and they were carefully considered by Romer J. in *In re Viscount Portman (No. 2)*,[13] to which we refer hereafter), we think that it is true to say that if those reasons were adopted and applied to the present case the first defendant would fail; for the judge does seem to have treated the £10,000 as though it had been an ordinary pecuniary legacy payable at a future time, namely, upon the widow's death. In truth, however, the judge was in error in thinking that the decision in *Berry* v. *Gaukroger*[14] was conclusive of the case; for it had little, if any, bearing upon the question which was before him. In *Berry* v. *Gaukroger*[14] a testator, who died in 1869, gave his residuary realty and personalty to trustees on trust to pay his funeral and testamentary expenses and debts, and to invest the residue and out of the income to pay his widow an annuity of £500; and he directed that after her death the trust funds should be held upon trust to pay thereout certain legacies amounting to £9,000 and to divide the residue among certain persons named in the will. The widow died in 1900, that is to say, after the Finance Act, 1894, came into operation. Under section 1 of that Act, estate duty was payable on the widow's death on so much of a fund which had been set aside to answer her annuity as represented real estate; but under section 21 (1) the duty was not payable on the portion representing personal estate. The proportion representing real estate was taken at 12/17ths of the whole fund and the estate duty on 12/17ths of the £9,000 legacies was £223. The question before the court was whether the pecuniary legatees ought to bear that sum by deduction from their legacies or whether it should be borne by residue.

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[10] [1903] 2 Ch. 116, 134; 19 T.L.R. 445.

[11] [1912] 1 Ch. 319.

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[12] [1903] 2 Ch. 116.

[13] [1925] Ch. 294.

[14] [1903] 2 Ch. 116.

Buckley J. exonerated the legatees from this burden, but the Court of Appeal held that the £223 ought to be borne by them. This summary of the facts demonstrates the essential difference between that case and *In re Charlesworth's Trusts*[15]; for in the latter case the legacies were not payable upon the death on which the liability to estate duty arose, whereas in *Berry* v. *Gaukroger*[16] they were. This distinction was emphasized by Romer J. in *In re Viscount Portman* (*No. 2*).[17] The facts of that case were that upon the death of the second Viscount Portman in 1919 certain estates in London forming part of the Portman settled estates stood limited to the use of the third viscount for life with remainders (which subsequently failed) to his first and other sons successively in tail male with remainder, if the defendant, the fourth viscount, should (as happened) succeed to the title, to the use (so far as material) that the fourth viscount and his assigns during his life should receive a yearly rentcharge of £50,000 to commence from his succession to the title and to be paid without any deduction except for death duties by equal quarterly payments. Subject as aforesaid, and as to the estates charged with the £50,000 rentcharge, subject thereto, all the Portman settled estates were limited to the use of the plaintiff for life with remainders over. Upon the death of the second viscount, estate duty became payable in respect of the London estates by 16 half-yearly instalments, only seven of which had been paid before the death of the third viscount, who died in 1923 without ever having had male issue and was thereupon succeeded by his brother, the fourth viscount. The balance under the nine instalments then due amounted to about £1,300,000. Further estate duty became payable on the death of the third viscount. The question before the court was as to what proportion of the aforesaid nine instalments and of the estate duty which became assessable upon the death of the third viscount in respect of the London estates should be borne by the yearly rentcharge of £50,000. At the original hearing of the originating summons (*In re Viscount Portman*[18]) it was admitted that there was no difference in principle in respect of the nine instalments which remained unpaid at the death of the third viscount and the estate duty which was assessable upon the third viscount's death; and an order was made upon the footing of the liability of the fourth viscount, in respect of his rentcharge, to contribute, in the manner therein mentioned, to both sets of estate duty. Before the order was drawn up, however, leave was given to withdraw the admission made at the hearing, and it was directed that the question with regard to the liability of the rentcharge in respect of the unpaid instalments should be argued. Inasmuch as (i) the rentcharge was plainly a charge upon the London estates which passed upon the death of the second viscount, and (ii) the estates did not pass to the second viscount's executor as such, the argument for the plaintiff was mainly founded upon section 14 (1) of the Finance Act, 1894, though reliance was also placed upon section 8 (4). It was argued, however, on behalf of the fourth viscount that section 14 (1) is really a procedure section, dealing with the recovery rather than with the incidence of estate duty; and that it is merely complementary to section 8 (4). Romer J. rejected this latter argument and held that section 14 (1) is not mere machinery but imposes liability under its own provisions. He then proceeded to inquire whether there was anything in *Berry* v. *Gaukroger* [19] which was inconsistent with that view and came to the conclusion that there was not. He summarized the judgments which were delivered in this court and said that that of Vaughan Williams L.J. was founded upon section 8 (4) of the Act; that Romer L.J. held that the legacies there in question were property which passed upon the death of the annuitant for a beneficial interest in possession and that, as under section 9 (1) the duty assessable as against the legatees became a first charge on the legacies as against the legatees, there was nothing to justify the court in holding that as between the residue and the pecuniary legatees the former ought to indemnify the latter against such duties; and that Cozens-Hardy L.J. based his judgment on section 8 (4) and thought that the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on the death of the annuitant and that the legatees were accountable to the Crown accordingly. The judge added that Romer L.J. had said that it was unnecessary for him to consider the effect of section 14 (1), and that Cozens-Hardy L.J. had doubted whether the contention based upon that subsection to the effect that the legacies were charged upon the fund belonging to the residuary legatees was well-founded, but had found it unnecessary to decide the point. Romer J. then considered the meaning to be attributed to the word "entitled" in section 14 (1) and, after indicating five possible meanings, which he specified, he said that the only authority bearing upon this question seemed to be *In re Charlesworth's Trusts.*[20] The judge recited the facts of that case and said that the question to be decided was whether the £10,000 which the widow had appointed ought to bear any part of the estate duty in question. He then proceeded as follows [21]: "Joyce J. held that the duty must be borne rateably by the "wife's appointees, and the settlor's residuary legatees. In the "course of his judgment he expressed himself as follows: 'Why "'this duty should be borne by one part of the fund and not "'by the other part, I cannot see. In my opinion *Berry* v. "'*Gaukroger* [22] applies to this case. When the two cases are "'compared there is no substantial difference between them. I "'think that the judgment of Cozens-Hardy L.J. is conclusive.' "But the judgment of Cozens-Hardy L.J. in *Berry* v. *Gaukroger* [22] was based upon the fact that the pecuniary legatees "in that case became entitled to a beneficial interest in possession immediately upon the death of the person on whose death "the estate duty became leviable, and so became personally "liable to a proportionate part of the duty under section 8 (4). "In the case before Joyce J. the £10,000 did not become an "interest in possession, or at all, until the death of the wife. "With all deference, therefore, to the learned judge, I am unable "to see how the judgment of Cozens-Hardy L.J. was conclusive "upon the point. For there was nothing in the sections of the "Act preceding section 14 to impose any liability to the duty "upon the persons who ultimately became entitled to the "£10,000. Joyce J., however, continued as follows: 'If it is "'said that there is a charge and that the £10,000 is to be paid "'first, then section 14 (1) is an answer to that. If Mrs. "'Charlesworth had died before her husband and there had "'been no intervening life estate, I do not see how the duty "'could have failed to have been apportioned between the two "'parts of the fund. In my opinion Mrs. Charlesworth's intervening life estate makes no difference, and I hold that the "'duty must be borne rateably by those who take the £10,000, "'and those who take the remainder of the settled fund.' It will "be observed that the learned judge did not say that the £10,000

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[15] [1912] 1 Ch. 319.

[16] [1903] 2 Ch. 116.

[17] [1925] Ch. 294.

[18] [1924] 2 Ch. 6.

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[19] [1903] 2 Ch. 116.

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[20] [1912] 1 Ch. 319.
[21] [1925] Ch. 294, 309.
[22] [1903] 2 Ch. 116.

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"was a charge upon the fund. To have done so would have "been to disregard the doubts expressed both by Vaughan "Williams L.J. and Cozens-Hardy L.J. in *Berry* v. *Gaukroger.*[23] "But he must undoubtedly have been of the opinion that if the "£10,000 did constitute a charge upon the fund it ought to bear "a rateable part of the estate duty, although it did not become "a charge until after the duty had been paid. He therefore "treated the word 'entitled' in section 14 (1), as meaning "entitled at any time." In the result Romer J. held that the fourth viscount was liable by virtue of section 14 (1) to contribute towards payment of the outstanding instalments of estate duty which were in question. His actual decision is not, of course, material to the present appeal because the legacies now in question were not charged upon the residuary estate and section 14 (1), therefore, has no application. The decision has, however, an important relevance to the present case. The judge made it plain that in so far as Joyce J. founded himself in *In re Charlesworth's Trusts* [24] on either the decision or the judgments in *Berry* v. *Gaukroger*,[25] he was mistaken. We agree with Romer J.'s criticism of *In re Charlesworth's Trusts.*[26] True it is that Romer J. said that he thought he ought to follow the decision as it had been given over 13 years previously and, for aught he knew to the contrary, had been acted upon in practice ever since. It is clear, however, that he only followed it in adopting the view which Joyce J. had apparently expressed as to the meaning of the word "entitled" in section 14 (1), viz., that it meant (or included) entitled at some future time to any sum charged upon settled property. This sufficiently appears from what Romer J. said in favour of that view. "Directly you find," he said,[27] "that a "person is entitled to a charge upon property in respect of "which estate duty has been paid, the charge being created by "a disposition not containing any express provision to the "contrary, that person is liable to pay a proper rateable part of "the duty"; and he said that that view gives effect to the prima facie meaning of the words in the subsection. Romer J. in no way indicated his approval of the apparent application by Joyce J. of section 14 (1), by way of analogy, to a case where a legatee is entitled at a future time to payment of a sum which is not charged upon a settled fund; and to the extent that

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[23] [1903] 2 Ch. 116, 130, 134.

[24] [1912] 1 Ch. 319.

[25] [1903] 2 Ch. 116.

[26] [1912] 1 Ch. 319.

[27] [1925] Ch. 294, 310.

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Joyce J.'s decision imposed liability on such a legatee it cannot, in our judgment, be supported.

No textbook, so far as we are aware, has treated *In re Charlesworth's Trusts* [28] as a decision covering such a case as the present. In our judgment Joyce J.'s judgment could only be supported (if at all) on the ground that the intention of the settlor in that case was that the £10,000 over which his widow was given a power of appointment was to constitute a fractional part of the entire settled fund so that the recipients of that part should stand in all respects on the same footing as those to whom the rest of the fund was given. Such an approach could not, however, be sustained, in our judgment, in a case, such as the present, where ordinary pecuniary legatees are concerned; for, as we have previously stated, a pecuniary legacy takes precedence over residue, and residue can only be ascertained after the legacies have been paid. Apart from *In re Charlesworth's Trusts* [28] no case was brought to our attention which affords much assistance in the solution of the present problem. Reference was made to the decision of Astbury J. in *In re Hicklin.*[29] That decision, however, went no further than to apply the general principle (which the judge thought, and perhaps rightly, was supported by the judgments of Romer L.J. and Cozens-Hardy L.J. in *Berry* v. *Gaukroger* [30]) that where a fund is, at the time of distribution, subject to a charge for estate duty under section 9 (1) of the Act of 1894, that charge must be borne rateably by the several beneficial interests in the fund. The decision has no application to the present case, for the charge which arose on Alexander McNeill's death had ceased to exist before the time for payment of the legacies had arrived.

In our judgment, there is no equitable principle which justifies or requires that the pecuniary legatees under clause 14 (1) of the testator's will should be charged with any proportion of the relevant duty; and as there is, in our opinion, no statutory provision and no expression of testamentary intention which imposes the liability on the legatees, they are, in our judgment, immune from it. On this point, accordingly, we allow the appeal.

Appeal on first point dismissed. Appeal on second point allowed.
Leave to appeal to the House of Lords.

Solicitors: *Rider, Heaton, Meredith & Mills; Simon, Haynes, Barlas & Cassels.*

E. D.

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[28] [1912] 1 Ch. 319.

[29] [1917] 2 Ch. 278; 33 T.L.R. 478.

[30] [1903] 2 Ch. 116.

1957
May 28, 29.

Wynn-Parry J.

In re PINEWOOD ESTATE, FARNBOROUGH.

[1956 P. No. 3667.]

Restrictive Covenant—Enforceability—Transfer of benefit—Absence of building scheme, words of annexation or complete chain of assignments—Whether fourth method of transfer.

The applicants were the owners of certain lots comprised in the P. estate, including part of lot 19, and the respondent was the owner of certain other plots, including the remaining part of lot 19. In December, 1899, the C. bank, who was the owner of the whole estate, laid it out for disposal in 23 lots and conveyed them to four different purchasers, A., B., P. and P. and F. jointly. In each case the lots were conveyed subject to certain restrictive stipulations scheduled to the four conveyances. The four purchasers on December 21, 1899, entered into a deed of covenant—P. and F. being grouped together as one party and P. being also a separate party—which recited that whereas they had agreed to release each other from the restrictive stipulations scheduled to the four conveyances and "in consideration of such release to enter into the covenant "hereinafter contained for the observance and performance of the "restrictive stipulations [scheduled to the deed of covenant] it "being intended that the restrictive stipulations contained in the "schedule to these presents shall supersede" the restrictions scheduled to the four conveyances. By the operative part of the deed the parties mutually released and discharged each other and their respective heirs, assigns and the freehold hereditaments from the restrictions scheduled to the conveyances and in consideration thereof each of the parties covenanted with each other and every two and three of them, his, her or their heirs and assigns and with intent to bind the land into whosesoever hands the same might come to observe, perform, fulfil and keep the restrictive stipulations contained in the schedule to the deed.

On a summons by the applicants for a declaration that the use and enjoyment of their property was not in any way affected by the restrictions covenanted to be observed in the deed of covenant dated December 21, 1899, it was conceded by the applicants that immediately before the execution of that deed there was in existence a building scheme. It was conceded by the respondent that the benefit of the covenants had not been annexed by any proper words of annexation and that there had been no complete chain of assignments of the benefit of the covenants:—

Held, (1) that the existing building scheme had been brought to an end by the deed of December 21, 1899, and that on the true construction of that deed no new building scheme within *Elliston* v. *Reacher* [1908] 2 Ch. 374 had been brought into existence. That, accordingly, in the absence of (i) a building scheme, (ii) any annexation by proper words of annexation, or (iii) any complete chain of assignments, the benefit of the covenants did not extend to the respondent, there being no fourth method whereby the benefit of a restrictive covenant could be transferred.

(2) Obiter, that as P. was a separate covenantor in the 1899 deed, and as the covenant by P. and F. in that deed was a joint covenant, the whole covenant and, therefore, the deed was void.

Ridley v. *Lee* [1935] Ch. 591; 51 T.L.R. 364 applied.

ADJOURNED SUMMONS.

The applicants, New Ideal Homesteads Ltd., sought by originating summons a declaration that the use and enjoyment of their property was not in any way affected by the restrictions which were covenanted to be observed in certain indentures dated December 21, 1899, and March 25, 1919.

Immediately before the execution of conveyances in December, 1899, the Pinewood estate, situate at Farnborough, in the county of Southampton, was the property of the Capital and Counties Bank Ltd., who laid out the estate for disposal in 23 lots. The applicants, at the date of this summons, were the owners of lots 11 to 18, the northerly part of lot 19, lot 20 and lots 21 to 23. The respondent was the owner of the southerly portion of lot 19 together with other land to the south thereof on which was erected a house where she resided. In December, 1899, the bank disposed of the estates as follows: By an indenture dated December 20, 1899, and made between the bank of the one part and Ethyl Mary Bull (hereinafter called "Mrs. "Bull") of the other part, lot 1 was conveyed to Mrs. Bull. By an indenture dated December 19, 1899, and made between the bank of the one part and Charles Wilbraham Perryman of the other part, lots 2 to 10 were conveyed to Perryman. By an indenture dated December 19, 1899, and made between the bank of the first part, Perryman of the second part and Herbert Bull of the third part, lots 11 to 16 and 20 to 23 were conveyed to Bull. By an indenture dated December 19, 1899, and made between the bank of the one part and Perryman and William Edward Foster of the other part, lots 17 to 19 were conveyed to Perryman and Foster as tenants in common. In the case of each of the indentures the lot or lots conveyed were conveyed subject to the observance and performance of certain restrictive stipulations contained in schedules thereto. By a deed of covenant dated December 21, 1899, and made between Ethyl Mary Bull of the first part, Herbert Bull of the second part, Perryman of the third part and Perryman and Foster of the fourth part, (a) the parties thereto mutually released and discharged each other and their respective heirs, assigns and the freehold

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hereditaments and premises to which the same related from the restrictive stipulations which were scheduled to the four conveyances, and in consideration thereof (b) each of the parties thereto covenanted for himself or herself, his or her heirs and assigns with each other party and every two and three of them, his, her and their heirs and assigns and with intent to bind the land to which restrictive stipulations contained in the schedule to the 1899 deed of covenant related into whosesoever hands the same might come to observe and perform the restrictive stipulations contained in the schedule to the deed so far as the same related to the hereditaments and premises of and belonging to the respective covenantors.

By conveyances dated respectively July 9, 1906, October 25, 1907, and October 26, 1907, lots 2, 3 and 4, part of lot 7, lots 8 and 9 and part of lot 10, and lots 5 and 6, were conveyed to different persons subject to the schedule restrictions, the conveyances containing no assignment of the benefit thereof. By a conveyance dated September 30, 1907, lots 17 to 19 were conveyed to Bull subject to and with the benefit of the covenants, restrictions and conditions contained in the 1899 deed of covenant. By a conveyance dated March 25, 1919, and made between Bull of the first part, Mrs. Bull of the second part, and William Shirley of the third part, lots 7, 8, 9 and 11 to 23 were conveyed by Bull to William Shirley, and lot 1 by Mrs. Bull to Shirley. In each case the property was conveyed subject to the stipulation set out in the schedule to the conveyance, and Shirley, for himself, his heirs and assigns, covenanted with Bull and Mrs. Bull that such covenant should be binding on the hereditaments conveyed into whosesoever hands the same might come, and that he, his heirs and assignees would at all times observe and perform the stipulations contained in the schedule. Those stipulations were similar to those contained in the 1899 deed of covenant, but in the 1919 conveyance there was no reference to the 1899 deed of covenant.

The applicants now contended that neither the respondent nor any person who owned any other land comprised in the 1899 deed of covenant was entitled to enforce the scheduled restrictions either as a result of their inclusion in the 1899 deed of covenant or the 1919 conveyance.

G. H. Newsom Q.C. and *W. S. Wigglesworth* for the applicants. It is conceded that immediately before the execution of the deed of covenant dated December 21, 1899, there was a scheme of development within the meaning of *Elliston* v. *Reacher.*[1] But that deed, as a matter of construction, destroyed the scheme, and the parties' rights now arise solely out of that deed. It is also conceded that the burden of the restrictive covenants in that deed has devolved upon the applicants; but it is denied that the respondent or any other person is now entitled to the benefit of them.

None of the original parties to the deed is now concerned, and the question, therefore, is as to the devolution of the benefit. There are three, and only three, ways in which a person, not being an original covenantee, can become entitled to the benefit of a covenant, namely: (i) by annexation: *Rogers* v. *Hosegood* [2]; (ii) by a chain of express assignments, where the covenant is taken for the benefit of ascertainable land of the covenantee: *In re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter* [3]; or (iii) under a scheme of development: *Elliston* v. *Reacher.*[4] Here there was no annexation, and the chain of express assignments is not complete. Nor was there a scheme of development within *Elliston* v. *Reacher*,[4] because by December 21, 1899, there was no common vendor, and a common vendor is one of the essential ingredients in a scheme.

Further, the fact that Perryman and Foster were joint covenantors and covenantees as parties of one part while Perryman was a separate covenantor and covenantee as a party of another part makes it impossible for the deed of December 21, 1899, to be the source of a valid scheme of development: *Ridley* v. *Lee*,[5] *per* Luxmoore J. Also the applicants' land and the respondent's land was in the same ownership from 1907 onwards for many years, and unity of seisin destroys a restrictive covenant, because a person cannot sue himself; when the lands are separated again later the covenant is gone and cannot revive.

Harold Christie Q.C. and *Hector Hillaby* for the respondent. Mutuality of rights and obligations is the real basis on which building schemes rest and this mutuality arises in those cases from the purchase from a common vendor. But the same mutuality can be created by deed of mutual covenant between owners of adjoining parcels of land: *Whatman* v. *Gibson.*[6] The deed of covenant in the present case shows by its language a clear intention that the parties should be mutually bound by the covenants and that element of mutuality is enough to carry the benefit of the restrictions without express assignment.

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[1] [1908] 2 Ch. 374; [1908] 2 Ch. 665 (C.A.).

[2] [1900] 2 Ch. 388.

[3] [1933] Ch. 611.

[4] [1908] 2 Ch. 374, 665 (C.A.).

[5] [1935] Ch. 591, 603.

[6] (1838) 9 Sim. 196.

Newsom Q.C. in reply. As to the triple classification, the applicants rely on the statements of Farwell J. in *Osborne* v. *Bradley*[7] and of Romer L.J. in *Union of London and Smith's Bank Ltd.'s Conveyance, In re, Miles* v. *Easter.*[8] *Whatman* v. *Gibson*[9] seems to have been a very early example of a scheme of development; there was a common vendor. There is no case of a scheme to be found without a common vendor.

WYNN-PARRY J. It is not to be doubted that the applicants are bound by the terms of the deed of December 21, 1899, so far as the burden of the covenants therein contained is concerned. The question which I have to determine is whether the respondent, or, indeed, anybody else, is entitled to enforce those covenants.

I propose first to consider whether there is in existence what is known as a building scheme affecting this area of land which is clearly ascertained; because, if there is an existing building scheme fulfilling the conditions laid down by Parker J. in *Elliston* v. *Reacher*,[1] then the respondent and the other persons interested will have the benefit of the covenants in the deed. It is conceded, and I think rightly, that immediately before the execution of this deed on December 21, 1899, there was such a building scheme. There was a common vendor, the Capital and Counties Bank, which was dealing with land which had been laid out for the purpose of development in lots, and they sold the lots to the persons who were parties to the deed of December 21, 1899. It is also clear that in the conveyances to these parties the bank imposed certain restrictions, with the terms of which I am not concerned. What apparently happened was, that the purchasers from the bank were not satisfied with the restrictions which had been imposed upon them respectively by the bank, and, therefore, they entered into this deed for the purpose of bringing into existence a new set of restrictions. The question arises (and this, of course, is a question of construction): What was the effect of what they did? Was it merely, as has been contended by the respondent, to alter the terms of the building scheme so far as regards the restrictions, or was it, as is contended for on behalf of the applicants, to destroy the building scheme and put in its place this document as constituting the entirety of the rights of the parties against each other?

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[7] [1903] 2 Ch. 446, 450.

[8] [1933] Ch. 611, 627, 628.

[9] 9 Sim. 196.

[1] [1908] 2 Ch. 374; [1908] 2 Ch. 665 (C.A.).

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Wynn-Parry J.

In the first place, it is to be observed that the bank is not a party. The bank, it is agreed, had disposed of all the land in the neighbourhood in which it had been interested to the four parties to the deed. No doubt it was thought, therefore, that there was no need to make the bank a party. The document recites the interests of the respective parties, and states that the land conveyed to them was conveyed on the basis of its being subject to the observance and performance of certain restrictive stipulations contained in the schedules to the respective documents by which their shares in the land were conveyed to them.

Then there appears this recital: " And whereas the parties " hereto have agreed to release each other from the said restric- " tive stipulations which are scheduled to the four several " hereinbefore recited indentures of conveyance and in considera- " tion of such release to enter into the covenant hereinafter " contained for the observance and performance of the restrictive " stipulations contained in the schedule to these presents it being " intended that the restrictive stipulations contained in the " schedule to these presents shall supersede the aforesaid restric- " tive stipulations which are scheduled to the four several herein- " before recited indentures of conveyance." In the operative part of the deed that intention was carried out in the following language: " Now this indenture witnesseth that in consideration " of the premises the parties to these presents do hereby mutually " release and discharge each other and their respective heirs and " assigns and the freehold hereditaments and premises to which " the same relate from the restrictive stipulations which are " scheduled to the four hereinbefore recited indentures of convey- " ance and in consideration thereof each of the parties to these " presents doth hereby covenant for himself or herself his or her " heirs and assigns with each other party hereto and every two " and three of them his her and their heirs and assigns and with " intent to bind the land to which the restrictive stipulations " contained in the schedule to these presents relate into whoseso- " ever hands the same may come . . . to observe perform fulfil " and keep the restrictive stipulations contained in the Schedule " to these presents so far as the same relate to the hereditaments " and premises of and belonging to the respective covenantors."

Let me comment on that language: In the first place, both in the recital and in the operative part the word " release " is used, and, indeed, in the operative part the phrase " release and " discharge " is used; so that what was done—and there can be no doubt about this—was that the pre-existing set of restrictive stipulations was abolished, and the parties and each of them were discharged therefrom. Then, with deliberate intent, there was brought into existence a number of new restrictive stipulations which are set out in the schedule to the deed, to the language of which I need not refer. As was pointed out by Mr. Newsom, if this document had been expressed to be supplemental to the four pre-existing documents, there might have been some ground for the argument that this document should be treated merely as a modification of an existing scheme, but it was not so expressed. Upon the face of it, and in view of the language which is used, it is a document which wipes out the past so far as the restrictions as to user are concerned; and which brings into existence as between these four parties for all purposes a new set of restrictive stipulations. In my judgment, on the true construction of the document, any pre-existing building scheme, as that phrase is used in *Elliston* v. *Reacher*,[2] was brought to an end. The parties, by the language which they have used, must be taken to have determined that for the future their rights as between each other would depend upon and be found only in this deed of December 21, 1899. I, therefore, conclude that there is no building scheme, within the meaning of that phrase as used in *Elliston* v. *Reacher*,[2] in existence, and that, therefore, the respondent cannot assert with success that she can obtain the benefit of the restrictive stipulations by virtue of this document.

What, then, is her position? It is admitted by Mr. Newsom that she could claim the benefit of the restrictive covenants if it could be shown either that the benefit had been annexed by proper words of annexation, or that there was a complete chain of assignments of the benefit of the covenants; but it is conceded on behalf of the respondent that there are no words of annexation, and it is conceded that the chain is not complete. In those circumstances, what the respondent says is that she is entitled to the benefit of the restrictive provisions because it is a deed which shows clearly by its language an intention that the parties should be mutually bound by the restrictions, and that that element of mutuality is enough to carry the benefit of the restrictive stipulations. That means that they are endeavouring to set up a further method by which the benefit of restrictive stipulations can be transferred. They rely on *Whatman* v. *Gibson*[3]; but upon examination it will be found that in that case there was a common vendor, and, indeed, I should have thought that that case was to be supported upon the basis that, notwithstanding the fact that it was decided so long ago, it really contains the essential elements which Parker J. required in *Elliston* v. *Reacher*.[4] Therefore, I do not think that that case affords the respondent any support.

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[2] [1908] 2 Ch. 374.

[3] (1838) 9 Sim. 196.

The real question is: Is there a fourth class at all? The first class is the *Elliston* v. *Reacher* type of case; the second consists of cases where there are proper words of annexation; the third consists of cases where there is a continuous chain of express assignments. But is there a fourth class? In *Osborne* v. *Bradley*[5] Farwell J. said at the opening of his judgment[6]: "This is "an action on a covenant in a deed made between the plaintiff, "Mr. Osborne, and Mr. Bavin. Mr. Bradley, the defendant, was "a purchaser from Bavin. The conveyance was made expressly "subject to the covenants contained in the conveyance from "Osborne to Bavin. It is a conveyance in fee. Negative "covenants in conveyance in fee restricting the right of the "purchaser to use the land purchased may for the purposes of a "case like the present be considered as falling under three "classes: (i) where the covenant is entered into simply for the "vendor's own benefit [with that class I am not concerned in "this case]; (ii) where the covenant is for the benefit of the "vendor in his capacity of owner of a particular property; and "(iii) where the covenant is for the benefit of the vendor, in so "far as he reserves unsold property, and also for the benefit of "other purchasers, as part of what is called a building scheme." That third class is obviously of the *Elliston* v. *Reacher* class.

Mr. Newsom submitted, and I think he was right, that the second class stated by Farwell J. is really to be subdivided into two classes, namely, annexation and continuous chain of assignment. That, I think, emerges from *Union of London and Smith's Bank Ltd.'s Conveyance, In re, Miles* v. *Easter*.[7] The judgment of the Court of Appeal was delivered by Romer L.J. He said[8]: "That the plaintiff is bound by the covenants in question is not "disputed, in view of the fact that he purchased his lands with "notice of them. What is in dispute is the question whether "the defendants are entitled to the benefit of such covenants. "Now the defendants are not the original covenantees, and it "therefore becomes necessary to ascertain what person other than "the original covenantee is entitled to the benefit of a restrictive "covenant affecting land. This question was put to himself by

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[4] [1908] 2 Ch. 374.

[5] [1903] 2 Ch. 446.

[6] Ibid. 450.

[7] [1933] Ch. 611.

[8] Ibid. 627, 628.

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"Hall V.-C. in *Renals* v. *Cowlishaw*,[9] and the answer was given "in a judgment so well known that it is unnecessary to refer to "it at length. It is a judgment that has received the approval "both of this court and of the House of Lords, and has always "been regarded as a correct statement of the law upon the "subject. Stated shortly it laid down this: that, apart from "what are usually referred to as building scheme cases (and this "is not a case of that sort), a purchaser from the original "covenantee of land retained by him when he executed the "conveyance containing the covenant will be entitled to the "benefit of the covenant if the conveyance shows that the "covenant was intended to enure for the benefit of that particular "land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as "being intended to be benefited, it must also be shown that the "benefit was intended to enure to each portion of that land. In "such cases the benefit of the restrictive covenant will pass to "the purchaser without being mentioned. It runs with the land. "In all other cases the purchaser will not acquire the benefit of "the covenant unless that benefit be expressly assigned to him— "or, to use the words of the Vice-Chancellor,[10] 'it must appear "'that the benefit of the covenant was part of the subject-matter "'of the purchase.'" In my view that passage establishes the other two classes.

But I can find no authority, certainly none was cited to me, which establishes the fourth class suggested. In my opinion, therefore, it is not open either to the respondent or to anybody else upon this line of reasoning to rely on these restrictive covenants.

That is enough to dispose of the whole matter, but there is a further point developed by Mr. Newsom with which I should deal. He submitted that on the true construction of the document the proper conclusion is that the covenant by Perryman and Foster is a joint covenant, notwithstanding that they held the lots in which they were both interested, lots 17, 18 and 19, as tenants in common, and that in view of the fact that Perryman was also a separate covenantor, and in view of the reasoning of Luxmoore J. in *Ridley* v. *Lee*,[11] the whole covenant is void. I think, particularly having regard to the fact that Perryman and Foster are grouped as one party in the statement of the parties to the deed, that the covenant is a joint covenant, and had it been necessary

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[9] (1878) 9 Ch.D. 125.

[10] Ibid. 130.

[11] [1935] Ch. 591, 603; 51 T.L.R. 364.

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for me to decide this point, I should have regarded myself bound by the reasoning of Luxmoore J. in *Ridley* v. *Lee*,[11] and would have held that the deed was void.

In the result I propose to declare that the applicants' use and enjoyment of their land is in no way affected by the restrictions covenanted to be observed in the indentures dated December 21, 1899, and March 25, 1919.

Declaration accordingly.

Newsom Q.C. With regard to costs, in *In re Ballard's Conveyance* [12] Clauson J. gave no costs to the successful applicants, and ordered them to pay the unsuccessful respondents' costs down to the appointment before the master next after the evidence was completed, but no further costs. He did so on the ground that the respondents were entitled to be put at the applicants' expense into possession of all the facts necessary to enable them to decide whether their opposition would succeed, but once having those facts they should continue at their own risk. The applicants, having come to the court to clear their own title, cannot normally expect to receive any costs. The applicants submit to an order to pay the respondent's costs as between solicitor and client down to and including the last appointment before the master.

WYNN-PARRY J. made an order in the form suggested by the applicants' counsel.

Solicitors: *J. Eaton & Co.; Alec Woolf & Turk for Turk, Krish & Barstow, Farnham, Surrey.*

P. P.

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[11] [1935] Ch. 591.

[12] [1937] Ch. 473.

INLAND REVENUE COMMISSIONERS *v.* BUCHANAN.

C. A.

1957
Mar. 13.

Lord Goddard C.J., Jenkins and Sellers L.JJ.

Revenue—Income tax—Settlement—Surrender—Wife's surrender of life interest to children—Whether disposition—Whether "settlement"—Husband assessed in respect of income paid by trustees to infant children of wife's former marriage—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21 (1) (9).

I., who died in 1927, by his will settled his residuary estate on such of his children as were living at his death and their issue. I. had three sons, one of whom was G. D. was the daughter of G. and under the terms of the will and in the events which had

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happened she took a life interest in her father's share of the residuary estate expectant on his death, with remainder to her children. By her first marriage in 1930 D. had three children. Her first husband died in 1945, and in 1948 she married the taxpayer.

The will precluded life tenants from surrendering their interests except in favour of persons entitled in remainder, and on March 8, 1948, D. surrendered in favour of her children her life interest in the testator's residuary estate expectant upon the death of G. On March 9, 1948, G. also surrendered his life interest, whereupon D.'s children became entitled in interest, and on attaining 21, in possession to G.'s share of the residuary estate. During the children's minority the income was applied by the trustees of the will for their maintenance.

Assessments to surtax for the years 1949–1950 and 1950–1951 were made upon the taxpayer on the footing that the income paid to his wife's children by her former marriage was under section 21 of the Finance Act, 1936,[1] deemed to be the income of the mother, and that the taxpayer was accordingly liable to include such income in his total income for the purposes of surtax.

The taxpayer appealed:—

Held, (1) that the surrender by D. of her life interest was a disposition and, accordingly, a "settlement" within the meaning of section 21 (9) of the Finance Act, 1936.

(2) That in consequence of that disposition the income in question was paid for the benefit of the children of the settlor within the meaning of section 21, and that, accordingly, the assessments in question were rightly made.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

This was an appeal by the Crown from an order of Vaisey J. made on June 22, 1956, affirming a decision of the Commissioners for the Special Purposes of the Income Tax, who had allowed the taxpayer's appeal in respect of assessments to surtax made upon him for the years 1949–1950 and 1950–1951 in respect of certain income paid to children of his wife by a former marriage.

The following facts appear from the case stated: At a meeting of the Commissioners for the Special Purposes of the Income Tax

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[1] Finance Act, 1936, s. 21: "(1) Where, by virtue or in consequence of any settlement to which "this section applies and during the "life of the settlor, any income is "paid to or for the benefit of a child "of the settlor in any year of assessment, the income shall, if at the "commencement of that year the "child was an infant and unmarried, "be treated for all the purposes of "the Income Tax Acts as the income "of the settlor for that year and not "as the income of any other person. ". . . (9) In this section— . . . "(b) the expression 'settlement' "includes any disposition, trust, "covenant, agreement, arrangement "or transfer of assets."

Acts held on March 16, 1955, Major H. A. D. Buchanan (hereinafter called "the taxpayer") appealed against assessments to surtax made upon him for the years 1949–1950 and 1950–1951 in respect of certain income paid to children of his wife by a former marriage. Such assessments were made upon the footing that such income was under the provisions of section 21 of the Finance Act, 1936, deemed to be the income of the mother, and the appellant was accordingly liable to include such income in his total income for the purposes of surtax.

The following facts were admitted:

(a) Edward Cecil Guinness, the first Earl of Iveagh (hereinafter called "the testator"), died in 1927. By his will his residuary estate was settled upon such of his children as were living at his death and their issue. The children took a life interest with remainder as to each child's share to their issue, but any of such issue living at the testator's death took only a life interest, with remainder to their issue.

(b) The testator had three sons, one of whom was the Honourable Arthur Guinness (hereinafter called "Mr. Guinness"), and Lady Dufferin and Ava (hereinafter called "Lady Dufferin") was the daughter of Mr. Guinness. As she and her father were alive at the testator's death she took only a life interest in her father's share of the residuary estate expectant on his death, with remainder to her children. By her first marriage to the Marquis of Dufferin and Ava in 1930 she had three children. Her first husband was killed in action in 1945, and in 1948 she married the present appellant.

(c) By clause 4 (3) [2] of the will express power was given to life tenants to surrender their interests in favour of persons entitled in remainder, and on March 8, 1948, Lady Dufferin surrendered in favour of her children her life interest in the residuary estate of the testator, such interest being then in remainder expectant upon the death of her father Mr. Guinness. On March 9, 1948, Mr. Guinness also surrendered his life interest, and thereupon Lady Dufferin's children became " entitled in possession to Mr. " Guinness' share of the residuary estate." (The present appeal was not concerned with that part of Mr. Guinness' share of residue in which he had, as appears from such deed, surrendered his interest prior to the deed of March, 1948.)

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[2] The will provided for the forfeiture of the life interest of any beneficiary who attempted to dispose of it, in the following terms: "4 (3) Every "life interest (and including annui-"ties) shall continue only until the "life tenant becomes bankrupt or "purports to assign charge or dispose "of the same or does or attempts to "do or suffers any act or thing or "any event happens whereby if the "same income or right to possession "of the trust premises or some part "thereof if the same belonged to such "life tenant for an absolute life "interest the life tenant would be "deprived of the personal receipt or "possession thereof but subject to "the following exceptions and provi-"sions:—(*a*) Any such life tenant "may at any time surrender such life "interest or any part thereof to or in "favour of the person or any one or "more of the persons who would be "entitled thereto or to some share "thereof or of the trust premises in "which it subsists . . . if the life "tenant were then dead and any such "surrender shall operate so that the "person or persons in whose favour "it is made shall thereby become "entitled in like manner and for the "like estate or interest under my will "or under any such appointment as "if the life tenant were dead."

(d) During the relevant years Lady Dufferin's children were minors, and the income before referred to was therefore expended for their benefit in accordance with clause 28 (2) of the will, which provided, inter alia: " That the income during any " suspense of vesting of any life interest or tenancy in tail or of " any share in my residuary estate shall be applicable in the " discretion of my trustees for the maintenance, education or " benefit of the person expectantly entitled thereto but only up " to and not exceeding in respect of each such person the annual " sum of £20,000, and with power to my trustees to pay the same " or any part thereof to any third party to be so applied without " being bound to see or being responsible for the application " thereof. . . ."

It was contended on behalf of the taxpayer that: (i) any income paid to the children was paid in consequence of the provisions of the will, in particular clause 28 (2) thereof; (ii) such income was not paid by virtue or in consequence of the surrender by Lady Dufferin in 1948, and, consequently, section 21 of the Finance Act, 1936, did not apply to such income; (iii) if, contrary to the first two contentions, section 21 did apply to such income, then there were two " settlors " within the definition of that term in section 21 (9) of the Finance Act, 1936, namely, the testator and Lady Dufferin, and the whole of such income fell to be attributed to the testator in accordance with the provisions of section 20 and the Sixth Schedule, Part II, to the Finance Act, 1943.

It was contended on behalf of the Commissioners of Inland Revenue that: (i) the income in question was paid to the children by virtue or in consequence of the surrender by Lady Dufferin, which was a " settlement " within the definition of such term in section 21 (9); (ii) the testator was not, in relation to that settlement, a settlor within the meaning of the provisions of the 1936 and 1943 Finance Acts; (iii) alternatively, if both the testator and Lady Dufferin were settlors, the income in question was, as from the date of death of Mr. Guinness, " income originating " from Lady Dufferin within the meaning of the Sixth Schedule to the Finance Act, 1943.

The commissioners gave their decision in writing as follows:

" 1. It is not disputed that the surrender by Lady Dufferin " and Ava on March 8, 1948, is a ' disposition ' within section 21 " (9) (*b*) of the Finance Act, 1936, and is therefore a ' settlement ' " within the meaning of this term as used in that section. We " hold, contrary to the [taxpayer's] first argument, that it was " ' by virtue or in consequence of ' this settlement, in conjunc- " tion with the will of the first Lord Iveagh dated November 2, " 1927, that income arising from his residuary estate became " payable to the children of Lady Dufferin and Ava in the years " of assessment with which we are dealing. The words ' in conse- " ' quence of ' are, in our view, too wide to admit of any other " conclusion.

" 2. The will of Lord Iveagh also clearly comes within the " definition of ' settlement ' in section 21 (9) (*c*) of the Finance " Act, 1936, and we consider that we must have regard to and " apply the provisions of section 20 and the Sixth Schedule to the " Finance Act, 1943, although such will was made, and probate " granted, before 1936. There is, in our view, nothing in the Act " of 1943 to exclude the consideration of funds provided by " settlement made earlier than 1936, although the operative pro- " vision of section 21 of the 1936 Act may not apply to income " arising from them.

" 3. We are directed by the Sixth Schedule, Part II, para- " graph 1 to take account in the case of Lady Dufferin and Ava " only of ' income originating ' from her, i.e., either ' income from " ' property originating from her,' or ' income provided directly or " ' indirectly ' by her. We do not consider it a proper or natural " use of language to say that Lady Dufferin and Ava ' provided ' " directly or indirectly either the property from which the income " arose or the income itself. In truth all was provided by Lord " Iveagh: Lady Dufferin and Ava merely declined in advance to " take the share in it left to her by the will. The position might " have been different if she had assigned a life interest in posses- " sion. The amount of income to be taken into account in her " case, therefore, is nil, and the appeal succeeds. We leave " figures to be agreed."

John Pennycuick Q.C., *E. B. Stamp* and *Sir Reginald Hills* for the Crown. The surrender by Lady Dufferin of her life interest was a disposition, and therefore a " settlement " within the meaning of section 21 (9) (*b*) of the Finance Act, 1936. The language of the subsection is couched in the widest terms. By executing the surrender Lady Dufferin undoubtedly disposed of her interest under her grandfather's will. Further, she could only dispose of it in favour of her children, since otherwise she would have forfeited the interest entirely: see clause 4 (3) of the will. It follows, therefore, that it was in consequence of the " settlement " that the income was paid to or for the benefit of the children of the " settlor " in the years of assessment in question. The purpose of section 21 was precisely to cover the class of transaction now in dispute.

It is an error to suppose that the testator was, in relation to that settlement, a settlor within the meaning of the Finance Acts, 1936 and 1943, and Vaisey J. was wrong in holding that the only settlement in the case was the will itself and that the income in question was provided by the testator and not by the children's mother. [Reference was also made to section 20 and the Sixth Schedule to the Finance Act, 1943.]

Charles Russell Q.C. and *H. H. Monroe* for the taxpayer. Lady Dufferin had no disposable interest under the testator's will; she had no more than a protected life interest which might be terminated in various ways, for example, by assigning or charging it, or attempting so to do, or by her bankruptcy: see clause 4 (3) of the will. The ensuing forfeiture would give rise to a discretionary trust for the benefit of, among others, her own children. The testator, in dealing with the various cases of termination of life interests, dealt specially with the case of providing, by means of a surrender, for the persons entitled in remainder; the will authorizes a life tenant to make such a surrender, but in such a case the trusts shall take effect as if the surrenderor was dead. In these circumstances Lady Dufferin had no disposable interest; all she could do was to get rid of her protected life interest under the will in one or other of the ways prescribed by the testator, in which case the property would pass in accordance with the trusts thereof. Accordingly, that which the Crown rely on as a settlement was not a disposition made by Lady Dufferin at all; it was a disposition made by the testator's will.

Further, there cannot be a settlement within section 21 of the Finance Act, 1936, of a life interest by means of a surrender.

The surrender of a life interest destroys the interest and there is nothing left of which a settlement can be made; to describe a life tenant surrendering his interest for the benefit of those entitled in remainder or reversion as a settlor, or the surrender, which is an extinction of his interest, as a settlement, is an abuse of language. [Reference was also made to section 20 of the Finance Act, 1943.]

Pennycuick Q.C. replied.

LORD GODDARD C.J. This is an appeal from a judgment of Vaisey J., who dismissed an appeal from a decision of the special commissioners given in favour of the taxpayer, Major Buchanan, though on a different ground. The question that is raised is whether Major Buchanan, who was then the husband of Lady Dufferin, is liable to surtax as her husband (her income, of course, being aggregated with his for surtax purposes) and whether, he being, as I say, liable to surtax, there must be brought into the computation sums of money, which were paid to the children of Lady Dufferin by her first marriage, by reason of the conditions of section 21 of the Finance Act, 1936.

[His Lordship stated the facts and continued:] Now, section 21 of the Finance Act of 1936—which was passed, as is well known, because parents were entering into covenants with trustees to apply a certain sum of money for the benefit of their children and that was a way of tax avoidance of which Parliament did not approve—provides that: "(1) Where, by virtue or in "consequence of any settlement to which this section applies "and during the life of the settlor, any income is paid to or for "the benefit of a child of the settlor in any year of assessment, "the income shall, if at the commencement of that year the "child was an infant and unmarried, be treated for all the "purposes of the Income Tax Acts as the income of the settlor "for that year and not as the income of any other person." By subsection (9) of that section it is provided that: "the expression "'settlement' includes any disposition, trust, covenant, agree- "ment, arrangement or transfer of assets."

Now, perhaps I ought to say, in order to mention and get rid of it, that the Finance Act of 1943 made special provision by section 20 with regard to settlements where there was more than one settlor, and the special commissioners decided this case in favour of the taxpayer by having recourse to that Act of 1943 and holding that the income in this case originated from Lord Iveagh. They regarded Lord Iveagh and his grand-daughter, Lady Dufferin, as both of them being settlors. Therefore, the special commissioners thought that the provisions of the Finance Act, 1943 (which I do not intend to go into in any detail), applied and, as the income derived from Lord Iveagh's will, they said that Lord Iveagh was the settlor and not Lady Dufferin. Vaisey J. did not take that view, and I cannot take that view, because I do not think for a moment that a will of a testator comes within section 20 at all; it is not a settlement to which the Act applies, and I think that that is a sufficient answer and gets rid of any argument based on the Finance Act, 1943.

Section 21 (9) provides that "the expression 'settlement' "includes any disposition, trust, covenant, agreement, arrange- "ment or transfer of assets," and Mr. Russell has argued very strenuously that a surrender is not a disposition. I should have great difficulty in holding that: I think it clearly is a disposition. A person can dispose of his interest in a fund or in a chattel or in anything else in a variety of ways, but if, having an interest in a fund, although the interest may not then be in possession, he surrenders that interest, it seems to me that he disposes of that interest. Still more is it clear in my mind that if he surrenders the interest the persons next entitled to that interest or to the income under the interest become thereby advanced.

In my opinion, when Lady Dufferin executed the surrender in question she did dispose of her interest under her grandfather's will, and she could only dispose of it to her children as otherwise she would have forfeited the interest altogether and then it would have become subject to various trusts under which, no doubt, the trustees might have applied it in favour of the children, but they would not have been obliged to do so. She exercised the power which the will had given her to surrender in favour of her children and, therefore, I think she disposed of the interest to her children.

Under those circumstances, looking at the clear words of section 21, it seems to me that it is in consequence of that disposition that income is paid for the benefit of the children of the settlor, because, if a disposition is a settlement, the person who disposes is, of course, the settlor and, therefore, the income is being paid for the benefit of her children. It seems to me, therefore, that the section entirely covers the facts of the case.

The terms of Lord Iveagh's will have been canvassed by counsel on both sides with great care, but what we are concerned with here is not so much the terms of Lord Iveagh's will as the terms of the section which was passed long after Lord

Iveagh's will was made, but which was designed to catch this particular class of transaction under which a parent, by means of some form of settlement, settled money upon his children the income of which he or she otherwise would have had and which would, therefore, have increased the parent's liability to surtax. It was for that very purpose that this transaction which we are now considering was carried out, and I think it is one that is obviously caught by the section.

For these reasons I am of the opinion that we should allow this appeal.

JENKINS L.J. I agree. Mr. Russell has persuasively argued that Lady Dufferin had no disposable interest under her grandfather's will: she had no more than a protected life interest which might be brought to an end in a variety of ways: she might assign or charge it or attempt so to do or she might go bankrupt. In those cases, and, no doubt, in others, the ensuing forfeiture would give rise to a discretionary trust for a variety of persons including her children.

The testator, says Mr. Russell, in dealing with the various cases of termination of life interests, dealt specially with one particular case, that of providing for the persons entitled in remainder by means of a surrender; and he authorized a life tenant to make such a surrender provided that, in cases where this was done, the trusts should take effect as if the surrenderor was dead. In those circumstances, says Mr. Russell, Lady Dufferin had no disposable interest; all she could do was to get rid of her protected life interest under the will in one or other of the ways marked out by the testator, in which case the property would pass in accordance with the trusts of the will. So, says Mr. Russell, that which is here relied on as a settlement was not in truth a disposition made by Lady Dufferin at all, it was a disposition made by the testator's will, a prior provision in favour of Lady Dufferin having been eliminated.

Persuasive as that argument is, I find myself unable to accept it. It is true that Lady Dufferin's interest was a protected life interest, but she was left free as regards dealing with it in one particular way: that is to say, by way of surrender in favour of persons entitled in remainder. She was entitled to the income under the protective trust, and it was for her to decide at her will and pleasure whether she should retain that income or surrender it for the benefit of those interested in remainder, namely, her three infant children. She chose to take the latter course, and the result was that the income she would otherwise have been enjoying as life tenant from the moment when her life interest fell into possession went to the children and became payable or applicable to them or for their benefit. Accordingly, I am unable to accept that part of Mr. Russell's argument.

Then, says Mr. Russell, there cannot be a settlement within the meaning of section 21 of the Finance Act, 1936, of a life interest by means of a surrender. He says a surrender of a life interest destroys the interest and there is nothing left of which a settlement can be made; and it is an abuse of language to describe a life tenant surrendering his interest for the benefit of those entitled in remainder or reversion as a settlor, or the surrender, an extinction of his interest, as a settlement. If this matter depended on the ordinary use of language, I would attach great weight to that argument. I do not think that, in ordinary parlance, one would describe as a settlement a transaction consisting simply of a surrender of a limited interest. But we are not concerned here merely with the ordinary use of words; we have to find out whether the transaction carried out in this case was a settlement within the special and extremely wide meaning assigned to that expression by section 21 of the Act of 1936.

Looking at those provisions, one finds, in section 21 (9) (*b*), that "the expression 'settlement' includes any disposition, "trust, covenant, agreement, arrangement or transfer of assets," and, in section 21 (9) (*c*), that "the expression 'settlor,' in "relation to a settlement, includes any person by whom the "settlement was made or entered into directly or indirectly." In my view, it is not open to doubt that a surrender is a disposition and therefore a settlement within that wide meaning.

With reference to Mr. Russell's argument that one cannot make a settlement of a life interest by surrendering and thereby destroying the interest, the section, it is to be observed, is not confined to cases where there is a settlement of a capital sum producing income or a settlement by way of covenant by the settlor to pay an annual or other periodical sum; the section applies in general terms to *any* income and not necessarily to income arising from a settled asset.

I will read the words of subsection (1) of this section: "Where, by virtue or in consequence of any settlement to which "this section applies and during the life of the settlor, any income "is paid to or for the benefit of a child of the settlor in any year "of assessment, the income shall, if at the commencement of "that year the child was an infant and unmarried, be treated "for all the purposes of the Income Tax Acts as the income of "the settlor for that year and not as the income of any other "person."

Applying this statutory provision to the present case, it appears to me that Lady Dufferin did make a settlement in that she made a disposition in the form of the surrender of her life interest. By virtue or in consequence of that disposition some income, that is to say, the income to which Lady Dufferin would have been entitled but for the surrender, was paid to or for the benefit of the children of the settlor, Lady Dufferin. Accordingly, in my opinion, the judge's decision in this case cannot stand. He came, in effect, to the conclusion that, on the language of this particular will, the only settlement in the case was the will itself, that this was the source from which the income was provided, and that Lady Dufferin's action in surrendering her life interest and bringing into effect the provisions of the will in remainder did not, in all the circumstances of this particular case, amount to a disposition within the meaning of the Act.

I find myself unable to agree with that view, and I entirely concur with the judgment delivered by my Lord and the reasoning on which it is based. In these circumstances, I think that this appeal should be allowed.

Sellers L.J. I agree that this appeal should be allowed for the reasons given by my Lord and Jenkins L.J.

Vaisey J. summarizes his decision in the case by saying that this is not a case which is brought within section 21 at all, as he thinks the income in question is provided not by the mother of these children but by Lord Iveagh who was their great grandfather. That is an acceptance of part of the submission which Mr. Russell so persuasively put before this court, but, if the surrender was (as both my Lords have held and as I agree) a settlement within the definition in the Finance Act, 1936, then section 21, in my judgment, does apply because it is in consequence of the settlement that the income was paid to or for the benefit of the children of the settlor in the year of assessment.

Appeal allowed.
Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Travers Smith, Braithwaite & Co.*

J. A. G.

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Oct. 4, 8;
Nov. 7, 27.

Harman J.

In re GILLINGHAM BUS DISASTER FUND. BOWMAN AND OTHERS *v.* OFFICIAL SOLICITOR AND OTHERS.

[1956 G. No. 1308.]

Charity—Imperfect trust provision—Memorial fund—Marine cadets killed in road accident—Trusts for paying funeral expenses, care of disabled and "other worthy causes"—Void for uncertainty—Whether validated by Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58), *ss.* 1, 2 (1) (3).

Bona vacantia—Failure of trust—Memorial fund—Trusts not charitable—Whether surplus funds to be held on resulting trust or bona vacantia.

On December 13, 1951, following a road accident in which a number of Royal Marine cadets were killed and injured, the plaintiffs, the then mayors of the surrounding towns, wrote a letter to a daily newspaper, which was published in the following terms: ". . . the Mayors . . . have decided to promote a Royal Marine "Cadet Corps Memorial Fund to be devoted, among other things, "to defraying the funeral expenses, caring for the boys who may "be disabled, and then to such worthy cause or causes in memory "of the boys who lost their lives, as the Mayors may determine." In response to the appeal the public contributed nearly £9,000, partly in large sums from known persons but mainly anonymously as a result of street collections, football matches, whist drives, and so forth. The plaintiffs, as trustees, having spent some £2,368 in defraying funeral expenses and caring for the disabled, now sought to determine whether the surplus was applicable cy-près for charitable purposes, or was repayable to the donors on a resulting trust or went to the Crown as bona vacantia:—

Held, (1) that the trust failed for uncertainty unless the Charitable Trusts (Validation) Act, 1954,[1] applied; that the letter of

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[1] Charitable Trusts (Validation) Act, 1954, s. 1: "(1) In this Act, "'imperfect trust provision' means "any provision declaring the objects "for which property is to be held "or applied, and so describing those "objects that, consistently with the "terms of the provision, the property "could be used exclusively for charitable purposes, but could nevertheless "be used for purposes which are not "charitable.

"(2) Subject to the following provisions of this Act, any imperfect "trust provision contained in an "instrument taking effect before the "sixteenth day of December, 1952, "shall have, and be deemed to have "had, effect in relation to any disposition or covenant to which this "Act applies—

"(*a*) as respects the period before "the commencement of this Act, as "if the whole of the declared objects "were charitable; and

"(*b*) as respects the period after "that commencement, as if the provision had required the property to "be held or applied for the declared "objects in so far only as they authorize use for charitable purposes. . . .

"(3) A document inviting gifts of "property to be held or applied for "objects declared by the document

December 13, 1951, making the appeal, was not an imperfect trust provision within section 1 (1) of that Act, because the money raised thereby could not be used, consistently with the terms of the appeal, for exclusively charitable objects, and it was not, therefore, a disposition of property to be applied for objects declared by an imperfect trust provision within section 2 (1). Accordingly, the Act was inapplicable and there could be no application cy-près of the fund.

(2) That the Crown, having failed to show that all or any of the donors had parted with their money out and out, the surplus of the fund should be held on a resulting trust for the donors and there should be an inquiry to ascertain their identity.

Cunnack v. *Edwards* [1896] 2 Ch. 679; 12 T.L.R. 614, and *Braithwaite* v. *Attorney-General* [1909] 1 Ch. 510; 25 T.L.R. 333 distinguished.

Dictum of Jenkins L.J. in *In re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622, 625; [1956] 3 All E.R. 164 considered.

ADJOURNED SUMMONS.

The plaintiffs, the trustees of the Gillingham Bus Disaster Memorial Fund, by this summons asked the court to determine (1) whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954, or otherwise; and (2) whether the surplus of the fund was applicable cy-près for some charitable purpose, or was repayable to the donors who contributed to the fund in the proportions of their gifts, or went to the Crown as bona vacantia.

The memorial fund had been promoted by the three mayors of Gillingham, Rochester and Chatham following a road accident in which 24 Royal Marine Cadets had been killed and several more injured. A letter was written by the town clerk of Gillingham to the editor of the " Daily Telegraph " and published on December 13, 1951, stating that the mayors intended to promote a memorial fund to be devoted, " among other things, to defraying the " funeral expenses, caring for the boys who may be disabled,

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" shall be treated for the purposes of " this section as an instrument taking " effect when it is first issued. . . ."

S. 2: " (1) Subject to the next " following subsection this Act applies " to any disposition of property to be " held or applied for objects declared " by an imperfect trust provision, and " to any covenant to make such a " disposition, where apart from this " Act the disposition or covenant is " invalid under the law of England " and Wales, but would be valid if the " objects were exclusively charitable. " . . .

" (3) A disposition in settlement or " other disposition creating more than " one interest in the same property " shall be treated for the purposes of " this Act as a separate disposition " in relation to each of the interests " created."

"and then to such worthy cause or causes . . . as the Mayors "may determine."

At the hearing of the summons the existence of this letter was not known, and according to the evidence the appeal had been launched by the mayors making an oral statement to the press (in the same terms as those appearing in the letter set out above), and the press accounts of the statement were relied on as constituting the foundations of the trust. Accordingly, question (1) of the summons was argued on the footing that the appeal had been based on an oral statement.

J. V. Nesbitt for the trustees.

Eric Griffith for the Official Solicitor (representing the donors) on question (1) of the summons. This trust is not charitable either on the footing of the objects of the appeal or by virtue of the Charitable Trusts (Validation) Act, 1954. It is in part a trust for certain identifiable individuals, i.e., the surviving boys and the estates of those killed, and that is a private trust. There is an express gift of the surplus for "worthy causes." Worthy causes are not charitable, the word "worthy" being vague and having no clear meaning. That is the essence of the oral statement made by the mayors to the press of which the newspaper advertisements were the memoranda.

Under the Charitable Trusts (Validation) Act, 1954, the word "instrument" cannot include the newspaper advertisements. There is no instrument or document inviting gifts of property within section 1 (3), but merely a series of newspaper reports of an oral statement. For the Act to apply, there must be in the instrument some reference to charity or there must be indicated some charitable purposes as the law knows them. Here there is neither.

An application of the fund restricted to exclusively charitable objects (under section 1 (2) (*a*)) is not an application consistent with the terms of the appeal, assuming that appeal to be a trust instrument, because it constitutes, first, two private trusts, and, secondly, an uncertain trust for worthy causes. The Act has no application and, therefore, the trusts are not validated.

Denys Buckley for the Attorney-General, claiming the surplus for charity. Where a fund is received by trustees in circumstances such as those of the present case, one must discover what the trusts are by reference to the circumstances of the receipt. If there is no formal trust instrument and the only funds received are in response to an appeal, then one must deduce the trusts from the terms of the appeal. The appeal is the statement made to the press for the purpose of disseminating it to the public through the newspapers. The appeal so published is the trust instrument and is thus a document inviting gifts of property and stating the trusts on which the property is to be held. Assuming that the appeal is an instrument under section 1 of the Act of 1954, it creates three distinct interests in the fund within section 2 (3), namely, funeral expenses, care, and other worthy causes, and therefore each must be taken separately; thus, worthy causes may all be charitable and so satisfy section 1 (1). When the first two objects are satisfied, the third object remains and is validated by section 1 (1).

Eric Griffith in reply. Whether or not there is a document inviting gifts of property, the trust originated in an oral statement. There is a risk in accepting for the purposes of this Act that the press reports of the oral statement should be treated as documents inviting gifts of property, for there may be a complete contradiction between the reports.

Section 1 (1) of the Act cannot be satisfied, because the fund cannot be used for exclusively charitable purposes because there are two trusts for individuals. Neither do the terms of the appeal create three separate interests in the fund within section 2 (3). The mere act of putting a shilling in a collecting box does not create any interest in that shilling, because the trustees must decide what is to happen to it. Where the trust provision gives the trustees a discretion, there can be no creation of separate interests by putting money into a collecting box. Section 2 (3) requires the interests to be created by a "disposition," and putting money in a collecting box cannot create interests.

Cur. adv. vult.

November 7. HARMAN J. read the following judgment: In December, 1951, there occurred an accident with tragic consequences, in Dock Road, Gillingham, in the county of Kent, when a motor-vehicle ran into a column of cadets marching along the road, killing 24 of them and injuring a further number. There was, of course, widespread concern at so shocking an event, and the three plaintiffs, then mayors of the surrounding areas, namely, Gillingham, Rochester and Chatham, determined to open a memorial fund. According to the evidence of the town clerk of Gillingham before me at the hearing, this was done by making a statement to the press, and the press accounts of the statement

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were relied upon as constituting the foundation of the so-called charity. I questioned this at the time, and it now turns out that the town clerk of Gillingham wrote a letter to the editor of the "Daily Telegraph," and I dare say to some other papers as well. At any rate, this letter appeared in the columns of the "Daily "Telegraph" on December 13, 1951: "Cadets' Memorial. To "the Editor of the 'Daily Telegraph.' Sir,—The Mayors of "Gillingham, Rochester and Chatham have decided to promote a "Royal Marine Cadet Corps Memorial Fund to be devoted, among "other things, to defraying the funeral expenses, caring for the "boys who may be disabled, and then to such worthy cause or "causes in memory of the boys who lost their lives, as the "Mayors may determine." There follows another observation by the town clerk, which is not relevant, and then are given the addresses of the mayors to which donations may be sent. It was signed "Yours faithfully, Frank Hill, Town Clerk, Gillingham." Mr. Hill had entirely forgotten the terms of the letter as written, but there it is. This appeal evoked a generous response from the public, whose subscriptions amounted to nearly £9,000, contributed partly in substantial sums by known persons, but mainly anonymously as a result of street collections, and so forth.

The result has shown that emotion is a bad foundation for such an activity. Each of the dead or injured cadets had at common law legal rights against the bus company, which were in due course asserted, with the result that compensation has been paid in full in accordance with the law. The plaintiffs administering the fund for the benefit of the victims have spent £2,368 14s. 9d., and are at a loss what to do with the balance—hence this summons. There are three claimants: first, the donors, who are represented by the Official Solicitor; second, the Crown, represented by the Treasury Solicitor, claiming the unwanted surplus of the fund as bona vacantia; and, third, the Attorney-General, claiming it for charity. It was agreed at the hearing that I should try the issue as to charity first.

Taking the town clerk's letter as the instrument constituting the trusts applicable to this money, I am constrained to say at the outset that it is most unfortunately worded. It begins by saying that the fund is to be devoted, "among other things," to certain objects. On the face of it, this would enable the fund to be devoted to any object in the world. I think this cannot be the true meaning, and that the words must be read so as to confine the objects to such worthy causes as shall keep green the memory of the boy victims. The money is to be spent primarily

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in defraying the funeral expenses of the dead and caring for the disabled, and secondarily on such other worthy causes as the mayors may determine. It was admitted at the Bar that the primary objects, namely, the funeral expenses and care of the boys, were not themselves charitable objects, there being no element of poverty involved, nor any section of the public. Further, " worthy " objects, while no doubt it would include charitable purposes, must include many others. It is perhaps a wider word even than " benevolent." It follows that the trust must fail for uncertainty unless the Charitable Trusts (Validation) Act, 1954, can be invoked to support it.

I have found this a most difficult Act to construe. I begin by reading the long title: " An Act to validate under the law of " England and Wales, and restrict to charitable objects, certain " instruments taking effect before the sixteenth day of December, " nineteen hundred and fifty-two, and providing for property to " be held or applied for objects partly but not exclusively " charitable." It came into operation on July 30, 1954. Section 1 reads: " (1) In this Act, ' imperfect trust provision ' means " any provision declaring the objects for which property is to be " held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be " used exclusively for charitable purposes, but could nevertheless " be used for purposes which are not charitable. (2) Subject to " the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before the " sixteenth day of December, nineteen hundred and fifty-two, " shall have, and be deemed to have had, effect in relation to any " disposition or covenant to which this Act applies—(*a*) . . . as " if the whole of the declared objects were charitable . . . (3) A " document inviting gifts of property to be held or applied for " objects declared by the document shall be treated for the " purposes of this section as an instrument taking effect when it " is first issued."

The first objection taken on behalf of the donors was that there was no instrument or document inviting these gifts, and on the evidence filed at the hearing a strong case was made on this point. It was difficult to see how an oral statement reported in a newspaper was a " document inviting gifts " or an " instrument." These difficulties have, however, been surmounted by the production of the letter published in the " Daily " Telegraph " of December 13, 1951, which I have read, and which I hold to be a document inviting gifts of property under section 1 (3) of the Act. In section 1 (1) the word "provision," where it occurs, seems to mean something which declares the trusts in question, and this, by virtue of subsection (3), must be "an instrument." It suffers further transmogrifications, as may be seen later in the Act.

The next argument was that the "provision," that is to say, the appeal, states two primary objects, which are admittedly not charitable, and it cannot (runs the argument) therefore be postulated "that the property could be used exclusively for "charitable purposes." The Attorney-General, in answer to this, relied on section 2 (3) of the Act, which is in these terms: "A "disposition in settlement or other disposition creating more "than one interest in the same property shall be treated for the "purposes of this Act as a separate disposition in relation to "each of the interests created." He argued that the instrument which, be it observed, has now changed its name from being a "provision" to being a "disposition," creates three interests in the same property (the property being the subscriptions), namely, funeral expenses, care, and other worthy causes, and that, therefore, each must be taken separately, and, so taking them, worthy causes might all be charitable and thus satisfy section 1 (1); when, therefore, everything which can properly be spent on the first two objects has been spent, the third object remains and is validated by the Act under section 1 (2). This is a very far-reaching submission. If it be right, a bequest "for such objects "as my trustees think fit" will be validated although nothing whatever about charity is mentioned in the will. The vaguer the words are, the better they will do. In my judgment, the Act was not intended to produce any such result. It was, as the long title shows, intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague. In my judgment, section 2 (3) cannot be called in aid, as has been claimed, for I do not think that the letter to the newspaper "creates more than one interest "in the same property." In fact, the letter created no interest in any property at all. It was merely an appeal which had the result of producing property in the hands of the three mayors. When they received it they were bound to devote it to the memory of the boys, first by the two specified non-charitable activities, and then by using the balance for worthy objects. The first two purposes and the worthy objects cannot be described, in my judgment, as different interests in the same property. If section 2 (3) cannot be called in aid, it seems to me to be tolerably clear that this letter is not an "imperfect trust provision," for the property, that is to say, the subscriptions given in answer to the appeal, cannot be used exclusively for charitable purposes. It is true that the first two non-charitable purposes have, on the evidence, been fulfilled, and no object is now left but some other worthy object, but the time when the matter had to be decided was, in my judgment, the time when the trust was set up. If I am right so far, it follows that section 2 (1) of the Act does not apply, because the letter was not "any disposition of property "to be held or applied for objects declared by an imperfect "trust provision." If this be so, there can be no scheme or application cy-près of the fund.

Declarations accordingly.

Then followed argument on question (2) of the summons.

Eric Griffith for the Official Solicitor. The discretionary trust to apply what is necessary for funeral expenses and helping the disabled boys having been exhausted, the trustees now have a balance of some £7,000 which would be held on trust for worthy causes if that were a valid trust. That trust fails for uncertainty; there is no general charitable intention and there is a resulting trust for the donors. When a subscriber can be identified, he is entitled to have his money back if the purpose of the charity has failed: see *per* Jenkins L.J. in *In re Ulverston and District New Hospital Building Trusts.*[1] The contributors should be found and the balance divided between them in proportion to their gifts. As to those who remain anonymous, then the money is held on a resulting trust for unascertainable objects. As between a resulting trust on the one hand and a claim for bona vacantia on the other, the general principle is one of resulting trust.

To go back to first principles, when one makes a gift of money for a definite charitable purpose, one parts with one's legal title, but there is no complete parting with one's beneficial interest. The trustees here are directed to hold the balance for worthy causes; that trust is impossible of execution; therefore, there has been no effective parting with the beneficial interest beyond the trustees' exercise of their powers in respect of funeral expenses and care of the injured.

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[1] [1956] Ch. 622, 633; [1956] 3 All E.R. 164.

If there is no general charitable intention and the initial object fails, there is a resulting trust for the donors: see the *Ulverston* case.[2] *Cunnack* v. *Edwards*[3] is distinguishable because, having regard to the constitution of the fund, no interest could have been held to remain in the contributor who had parted with his money out and out under a contract for the benefit of the widows. *Braithwaite* v. *Attorney-General*[4] is also distinguishable. Again, in *In re Customs and Excise Officers' Mutual Guarantee Fund*[5] it was the terms of the contract that excluded the ordinary rule of a resulting trust. In *In re Hobourn Aero Components Air Raid Distress Fund*[6] the Crown could have claimed, but did not, for bona vacantia, and there was held to be a resulting trust. [*In re Abbott*[7] was also referred to.]

John Brunyate for the Crown, claiming the surplus as bona vacantia. In considering whether in particular circumstances a subscriber should be treated as having abandoned his money, one must have regard to the different classes of subscription: (1) those made on terms peculiar to the subscriber, and (2) collecting-box money—the latter being the bulk of the money in this case. Where the circumstances of a public subscription are such as to make it clear that a subscriber has parted out and out with his money and there is no possibility of getting it back, then, if there be a surplus and the purpose of the subscription has failed, there are bona vacantia. From the circumstances and nature of the subscriptions in class (2) the court should draw the inference of complete abandonment. The dictum of Jenkins L.J. in the *Ulverston* case[8] is obiter and contrary to the decision in *In re Hillier's Trusts*.[9] [*In re Welsh Hospital* (*Netley*) *Fund*[10] was also referred to.]

There must be a distinction between a subscription by private arrangement and "collecting box money." A layman who put 6d. into a collecting box would never expect to have or even want his money back. He has chosen a way of contributing which makes it impossible to separate his money from that of the other small contributors. By the circumstances of his own contribution he shows that it is on a par with the other small contributions and made on the same terms. He suffers no hardship, because if he puts his money into a collecting box he is abandoning it

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[2] [1956] Ch. 622.

[3] [1896] 2 Ch. 679.

[4] [1909] 1 Ch. 510; 25 T.L.R. 333.

[5] [1917] 2 Ch. 18; 33 T.L.R. 311.

[6] [1946] Ch. 86.

[7] [1900] 2 Ch. 326.

[8] [1956] Ch. 622, 633.

[9] [1954] 1 W.L.R. 9, 700 (C.A.).

[10] [1921] 1 Ch. 655.

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GILLINGHAM BUS DISASTER FUND, *In re.*

completely. The true test is: Is it reasonable to suppose from the nature of the subscription that the subscriber contemplated the possibility of getting his money back?

To consider the case from the trustees' point of view: the trustees must be in a position to carry out the resulting trust. Where it is impossible for the trustees to give effect to the resulting trust with completeness, that is a factor which must rule against there being a resulting trust in law. In the present case it would be impracticable to give the subscribers their money back except in a few cases, and, if an inquiry were to be directed, most of the money will not be returned to them.

[HARMAN J. Does a resulting trust arise as a conclusion of law or from the intention of the subscriber?]

It arises from the intention to be imputed to the subscriber, which he may not have had in mind at the time he made his subscription.

As to money collected through whist drives or concerts: this is partly contract in that the donor is paying for his entertainment on a particular evening. There may be no element of charity at all. This comes very close to a case of contract, in that the donor is receiving entertainment for which he has paid. As to the donor who sent a cheque: on the assumption that he did not send a covering letter putting himself in a special position, then (1) he sends a cheque knowing that it will be mixed up with other people's money; (2) he should not on principle be dealt with differently from one who puts money in a collecting box; (3) on these facts, the reference in the appeal to "worthy causes," although void, can be taken into account when considering whether he had any intention of getting his money back. According to Jenkins L.J. in *In re Ulverston and District New Hospital Building Trusts*,[11] he expects to get back some small share of the surplus, but the Lord Justice was not there dealing with a surplus remaining after the fund had been partially applied. The question whether there is a resulting trust or whether there was complete abandonment of the money must be decided on the facts at the time the contributions were made; it must depend on the intention to be imputed to the donor at the time of making the gift: see Halsbury's Laws of England, 2nd ed., vol. 33, p. 142.

Eric Griffith replied.

Cur. adv. vult.

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[11] [1956] Ch. 622, 633.

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Gillingham Bus Disaster Fund, *In re.*

November 27. Harman J. read the following judgment: I have already decided that the surplus of this fund now in the hands of the plaintiffs as trustees ought not to be devoted to charitable purposes under a cy-près scheme. There arises now a further question, namely, whether, as the Treasury Solicitor claims, this surplus should be paid to the Crown as bona vacantia, or whether there is a resulting trust in favour of the subscribers, who are here represented by the Official Solicitor. The general principle must be that where money is held upon trust and the trusts declared do not exhaust the fund it will revert to the donor or settlor under what is called a resulting trust. The reasoning behind this is that the settlor or donor did not part with his money absolutely out and out but only sub modo to the intent that his wishes as declared by the declaration of trust should be carried into effect. When, therefore, this has been done any surplus still belongs to him. This doctrine does not, in my judgment, rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it. The resulting trust arises where that expectation is for some unforeseen reason cheated of fruition, and is an inference of law based on after-knowledge of the event.

Counsel for the Crown admitted that it was for him to show that this principle did not apply to the present case. Counsel for the subscribers cited to me *In re Abbott.*[1] In that case a fund had been subscribed for the relief of two distressed ladies who had been defrauded of their patrimony. There was no instrument of trust. When the survivor of them died the trustees had not expended the whole of the moneys subscribed and the summons asked whether this surplus resulted to the subscribers or whether it was payable to the personal representatives of the two ladies. Stirling J. had no difficulty in coming to the conclusion that the ladies were not intended to become the absolute owners of the fund and therefore their personal representatives had no claim. It was never suggested in this case that any claim by the Crown to bona vacantia might arise. A similar result was reached in *In re Hobourn Aero Components Air Raid Distress Fund,*[2] where the judge found that though the objects of the fund were charitable no general charitable intent was shown in the absence of any element of public benefit and decided that the money belonged to the subscribers upon a resulting trust. Here again no claim was made on behalf of the Crown that the surplus constituted bona vacantia.

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[1] [1900] 2 Ch. 326.

[2] [1946] Ch. 86.

I was referred to two cases where a claim was made to bona vacantia and succeeded. The first of these was *Cunnack* v. *Edwards*.[3] This was a case of a society formed to raise a fund by subscriptions and so forth from the members to provide for widows of deceased members. Upon the death of the last widow of a member it was found that there was a surplus. It was held by the Court of Appeal that no question of charity arose, that there was no resulting trust in favour of the subscribers, but that the surplus passed to the Crown as bona vacantia. A. L. Smith L.J. said this[4]: "But it was argued that the proper "implication is that when the society itself came to an end, as "it has done, there was then a resulting trust of what might "happen to be in the coffers of the society in favour of all the "personal representatives of those who had been members since "the year 1810, and Chitty J. has so held. Now it was never "contemplated that the society would come to an end; but, on "the contrary, provision was made for the introduction of new "members for its perpetual existence; and the existing members "had power to alter and revise the rules, so that, if it was found "that the society was too affluent, provision might be made as "to what was to be done with what money might not be wanted. "As the member paid his money to the society, so he divested "himself of all interest in this money for ever, with this one "reservation, that if the member left a widow she was to be "provided for during her widowhood. Except as to this he "abandoned and gave up the money for ever. The case of "*Smith* v. *Cooke*,[5] in which it was held there was no resulting "trust, shows the principle applicable to such a point. In my "opinion this case cannot be likened to that of a man providing "a fund by way of trust for the payment of an annuity to his "widow during her life, and making no provision for the fund "when the widow died and her interest therein ceased, in which "case there would be a resulting trust, because the implication "in such a case would be that the settlor intended that when "the trust came to an end the fund should revert to his representatives, he not having provided to whom it should then go. "In such a case there would be no abandonment of the fund as "in the present case. In my opinion there was no resulting trust

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[3] [1896] 2 Ch. 679; 12 T.L.R. 614.

[4] [1896] 2 Ch. 679, 683.

[5] [1891] A.C. 297.

"in favour of all those members who had ever subscribed to the "fund."

Rigby L.J. said [6]: "The members were not cestuis que trust "of the funds or of any part thereof, but persons who, under "contracts or quasi-contracts with the society, secured for "valuable consideration certain contingent benefits for their "widows which could be enforced by the widows in manner "provided by the Acts. Any surplus would, according to the "scheme of the rules, be properly used up (under appropriate "amendments of the rules) either in payment of larger annuities "or in reduction of contributions. It is true that no such alterations were made, and it is now too late so to distribute the "funds; but I do not think that such omission can give to the "contracting parties any benefit which they did not bargain for."

The ratio decidendi seems to have been that having regard to the constitution of the fund no interest could possibly be held to remain in the contributor who had parted with his money once and for all under a contract for the benefit of his widow. When this contract had been carried into effect the contributor had received all that he had contracted to get for his money and could not ask for any more.

A similar result was reached in the case of *Smith* v. *Cooke*,[7] cited by A. L. Smith L.J.,[8] though it does not appear from the report what the result was. Another case cited to me was *Braithwaite* v. *Attorney-General*.[9] Here again it was held that there was no room for a resulting trust and the claim to bona vacantia succeeded. The opponents there, it appears, were the last two surviving annuitants. Their claim was rejected on the ground that they had had or were having everything for which the contract provided. The claim of the Attorney-General on behalf of charity was rejected, it being held that there was no charity. A different result was reached by Kekewich J. in *In re Buck*,[10] but it was on the ground that the society was a charity and the money was therefore directed to be applied cy-près.

In addition there were cited to me the three hospital cases: *In re Welsh Hospital (Netley) Fund*,[11] *In re Hillier's Trusts*,[12] and *In re Ulverston and District New Hospital Building Trusts*.[13]

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[6] [1896] 2 Ch. 679, 689.

[7] [1891] A.C. 297.

[8] [1896] 2 Ch. 679, 683.

[9] [1909] 1 Ch. 510; 25 T.L.R. 333.

[10] [1896] 2 Ch. 727.

[11] [1921] 1 Ch. 655.

[12] [1954] 1 W.L.R. 9, 700 (C.A.); [1953] 2 All E.R. 1547; [1954] 2 All E.R. 59 (C.A.).

[13] [1956] Ch. 622; [1956] 3 All E.R. 164.

In the first of these cases P. O. Lawrence J. held that all subscribers to the hospital must be taken to have parted with their money with a general intention in favour of charity. This was the only contest in the case, between the subscribers on the one hand and charity on the other. In *Hillier's* case [14] Upjohn J., at first instance, found that certain categories of subscribers were entitled to have their money back but that others, namely, those who had contributed to collections at entertainments and so forth, had no such right. The Court of Appeal varied this order [15] and declared that the whole fund should go to charity but without prejudice to the right of any individual to prove that he had no general intention but only the particular intention in favour of one hospital. In the *Ulverston* case [16] the Court of Appeal decided that the whole fund had been collected with only one object and not for general charitable purposes and that, so far as money had been received from identifiable sources, there was a resulting trust. No claim to bona vacantia was there made, and Jenkins L.J., in explaining the position in *In re Hillier's Trusts*,[17] said this [18]: "I appreciate that anonymous contributors cannot expect "their contributions back in any circumstances, at all events so "long as they remain anonymous. I appreciate also the justice "of the conclusion that anonymous contributors must be regarded "as having parted with their money out-and-out, though I would "make a reservation in the case of an anonymous contributor "who was able to prove conclusively that he had in fact subscribed some specified amount to the fund. If the organisers "of a fund designed exclusively and solely for some particular "charitable purpose send round a collecting box on behalf of the "fund, I fail to see why a person who had put £5 into the box, "and could prove to the satisfaction of the court he had done so, "should not be entitled to have his money back in the event of "the failure of the sole and exclusive charitable purpose for "which his donation was solicited and made."

Jenkins L.J., in the course of his judgment,[19] threw out the suggestion that donations from unidentifiable donors might in such a case be treated as bona vacantia.

It was argued for the Crown that the subscribers to this fund must be taken to have parted with their money out and out, and that there was here, as in *Cunnack* v. *Edwards* [20] and *Braithwaite*

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[14] [1954] 1 W.L.R. 9.
[15] Ibid. 711.
[16] [1956] Ch. 622.
[17] [1954] 1 W.L.R. 9, 700.
[18] [1956] Ch. 622, 633.
[19] Ibid.
[20] [1896] 2 Ch. 679.

v. *Attorney-General*,[21] no room for a resulting trust. But there is a difference between those cases and this in that they were cases of contract and this is not. Further, it seems to me that the hospital cases are not of great help because the argument centred round general charitable intent, a point which cannot arise unless the immediate object be a charity. I have already held there is no such question here. In my judgment the nearest case is the *Hobourn* case,[22] which, however, is no authority for the present because no claim for bona vacantia was made.

In my judgment the Crown has failed to show that this case should not follow the ordinary rule merely because there was a number of donors who, I will assume, are unascertainable. I see no reason myself to suppose that the small giver who is anonymous has any wider intention than the large giver who can be named. They all give for the one object. If they can be found by inquiry the resulting trust can be executed in their favour. If they cannot I do not see how the money could then, with all respect to Jenkins L.J., change its destination and become bona vacantia. It will be merely money held upon a trust for which no beneficiary can be found. Such cases are common and where it is known that there are beneficiaries the fact that they cannot be ascertained does not entitle the Crown to come in and claim. The trustees must pay the money into court like any other trustee who cannot find his beneficiary. I conclude, therefore, that there must be an inquiry for the subscribers to this fund.

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co. for Town Clerk, Gillingham; Official Solicitor; Treasury Solicitor.*

P. P.

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[21] [1909] 1 Ch. 510.

[22] [1946] Ch. 86.

1957
Dec. 12, 13, 16.

Danckwerts J.

GRACE RYMER INVESTMENTS LTD. *v.* WAITE AND OTHERS.

[1957 G. 609.]

Landlord and Tenant — Rent restriction — Premium — Rent paid in advance—Three years' rent paid in advance by tenants—Whether such prepayment a premium—Flats let before mortgage—Whether tenancies invalidated—Right of mortgagee to possession—Whether "overriding interest" in occupants of flats—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (1) (5) (6).

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GRACE RYMER INVESTMENTS LTD. *v.* WAITE.

Land Registration—Effect of registration—Mortgage—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 21), *ss.* 20 (1), 27, 70 (1) (*g*) (*k*).

By a legal charge dated December 30, 1955, certain freehold property was charged in favour of a company to secure the repayment of the principal sum of £1,700, and it was provided that, if default was made by the mortgagors in payment of two monthly instalments, the principal money should become due and the statutory rights of the company should become exercisable. The property and the legal charge were duly registered at the Land Registry.

The property had, at the date of the legal charge, been divided into three flats, which were, in the latter half of 1955, let to three tenants who had been required to pay three years' rent in advance. Default having, in July, 1956, been made by the mortgagors in payment of the instalments, proceedings were commenced by the company for payment of the principal and interest and, the mortgagors having failed to comply with the order made against them in that action, proceedings were begun by the company on April 8, 1957, for delivery of possession of the property.

The tenants of the flats claimed that, having paid to the mortgagors sums by way of rent in advance, they were entitled to remain in occupation of the flats, on the ground that they were protected by the Rent Acts:—

Held, that the payments were within the scope and object of section 2 of the Landlord and Tenant (Rent Control) Act, 1949,[1] and were premiums unlawfully demanded by the landlord; that the fact that the tenants were compelled unlawfully to pay a premium to the mortgagors did not affect the validity of their tenancies, for the Rent Acts do not treat the tenant as tainted by the offence committed by the landlord; and that they were entitled to remain in possession and to deduct from their rents the amounts which they had paid, unless they elected to attempt to recover from the mortgagors the proportion referable to the future.

City Permanent Building Society v. *Miller* [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621 and *Woods* v. *Wise* [1955] 2 Q.B. 29; [1955] 1 All E.R. 767 considered.

ADJOURNED SUMMONS.

By a legal charge dated December 30, 1955, and made between Peter William Waite, Derek Walter Waite and William Henry Waite (the mortgagors) of the one part, and the plaintiff company of the other part, the freehold property known as No. 8,

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A person "shall not, as a condition of the "grant, renewal or continuance of "a tenancy to which this section "applies, require the payment of any "premium in addition to the rent . . . "(6) A person requiring any pre- "mium in contravention of this sec- "tion shall be liable on summary "conviction to a fine not exceeding "one hundred pounds, and the court "by which he is convicted may order "the amount of the premium, or so "much thereof as cannot lawfully be "required under this section, to be "repaid to the person by whom it was "paid."

Church Rise, Lewisham, registered at the Land Registry under title number 309940, was charged by way of legal mortgage in favour of the plaintiff company to secure the repayment of a principal sum of £1,700, and the payment in the meantime of interest thereon at the rate of 6 per cent. per annum with a proviso that, if the mortgagors should pay to the plaintiff company the said principal sum, together with interest by monthly instalments of £16 18s. on the first day of each month, the plaintiff company would accept payment of such instalments in satisfaction of the said principal moneys and interest thereby secured.

By clause 7 of the legal charge it was provided (inter alia) that if default should be made by the mortgagors in payment of any two consecutive monthly instalments, the whole of the said principal money and interest should become immediately due and payable and the statutory rights of the plaintiff company should forthwith become exercisable.

In July, 1956, default having been made by the mortgagors in payment of the instalments, the plaintiff company commenced proceedings for payment of the principal and interest due under the legal charge, and on October 10, 1956, judgment was given in favour of the plaintiff company for £1,655 10s. 10d. (which included £1,612 8s., the balance of the principal sum of £1,700 remaining unpaid). At the date of the commencement of the present proceedings the judgment remained wholly unsatisfied and the principal sum of £1,612 8s. remained outstanding on the security of the legal charge. The property comprised in the legal charge had been, at that date, divided into three flats, the ground floor flat being occupied by Terence Neill and his wife, Margaret Patricia Neill, the first floor flat by Frederick Spurling, and the second floor flat by Alexandrina Hitchen.

These proceedings were commenced on April 8, 1957, a summons being taken out by the company (the mortgagees under the legal charge) " for an order pursuant to Ord. 55, r. 5A, of the " Rules of the Supreme Court for delivery to the plaintiffs of " possession of the property comprised in a legal charge dated " December 30, 1955, and made between the three first-named " defendants [Peter William Waite, Derek Walter Waite and " William Henry Waite (the mortgagors)] of the one part and the " plaintiffs of the other part." The remaining four defendants were the occupants of the three flats.

The plaintiff company claimed to be entitled to possession of the whole of the property as mortgagee and had called on the defendants who occupied the flats to give up possession thereof. Each of the tenants refused to give up possession and claimed to be entitled to remain in possession of the flats occupied by them respectively as tenants of the mortgagors.

By a contract dated December 30, 1955, the property was sold to the mortgagors, and they were duly registered as proprietors thereof at the Land Registry on January 9, 1956, on which date the legal charge was also registered.

With regard to the transactions between the tenants and the mortgagors, Terence Neill stated, in his affidavit, that he and his wife, on October 11, 1955, paid to the mortgagors a sum of £401 15s., purporting to be three years' rent in advance, of a flat at a property known as 183, Devonshire Road. They never went into possession of that flat, but in December, 1955, they took possession of the ground floor flat at 8, Church Rise, Lewisham. Neill submitted that he had a weekly tenancy of the flat protected by the Rent Restriction Acts which was binding on the plaintiffs.

Frederick Spurling claimed to have paid to the mortgagors by way of rent in advance in respect of the first floor flat an aggregate sum of £315 18s., and (mutatis mutandis) made the same submissions and denials as those made by Mr. Neill in his affidavit.

Alexandrina Hitchen, the tenant of the second floor flat, paid the sum of £315 18s. as rent in advance and also made, in her affidavit, the same submissions and denials (mutatis mutandis) as those made by Mr. Neill in his affidavit.

Further details regarding these transactions are fully stated in the judgment.

Peter Oliver for the plaintiff company. The tenants must give up possession to the company as mortgagee. In *Hitchcock* v. *Waite*[2] Vaisey J., in somewhat similar circumstances, regarded rents paid in advance as being outside the power of the mortgagors to accept, and, while recognizing that three tenants of the mortgagors, to whom unfurnished flats had been let at weekly rents and who had paid three years in advance, had been grievously wronged, ordered those tenants to give up possession to the mortgagee. The present transaction was illegal and could not give rise to the enforcement of the agreement. It was not binding on anyone. The company was entitled to possession. [Reference was made to Blundell's Rent Restriction Cases,

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[2] *The Times*, May 30, 1957, p. 15.

3rd ed., para. 290.] *Woolwich Equitable Building Society* v. *Marshall*[3] was approved by the Court of Appeal in *Church of England Building Society* v. *Piskor*.[4] [Reference was also made to *Mornington Permanent Building Society* v. *Kenway*.[5]]

Norman F. Stogdon for the defendant tenants of the flats. Questions arise whether premiums are being paid and whether a weekly or periodical tenancy is created at common law. Every case must be looked at on its own facts. The tenants have in the present case gone into possession and the landlord has been paid rent in advance, but it has never been decided how much advance rent can be taken before it is considered to be a premium. There was no illegality there. This advance payment of rent is not a premium. Advance rent can legally be accepted. [Reference was made to *Rush* v. *Matthews*.[6]] In this case the money is either rent or partly rent and partly premium. [Reference was made to *Montagu* v. *Browning*.[7]] Even if there was illegality the tenants were not party to it—they were the victims of the illegality. This is made abundantly clear by section 2 (6) of the Act of 1949.

Cur. adv. vult.

Danckwerts J. This is a summons by a mortgagee, asking for an order for possession of certain property known as 8, Church Rise, Lewisham, in the County of London. I am afraid it is another case of the kind of fraud perpetrated by the Waites (a father and two sons), who have been responsible for other litigation of a similar type. They are the mortgagors, but they have not appeared at the hearing before me. The pattern of these cases is that the Waites arrange to purchase properties with the aid of a mortgage, and then let off the properties in flats, obtaining some three years' rent in advance from the prospective tenants. When the Waites fall into arrears with their mortgage payments and the mortgagees seek to enforce their security and obtain possession of the mortgaged property, they find themselves faced with the claims of tenants to retain occupation of the property for which they have paid three years' rent in advance. The situation, therefore, is that either the mortgagees are deprived of the full benefit of their security or the unfortunate tenants will lose the benefit of the considerable sums which they have paid, representing a loss which they cannot easily replace.

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[3] [1952] Ch. 1; [1951] 2 T.L.R. 786; [1951] 2 All E.R. 783.

[4] [1954] Ch. 553; [1954] 2 All E.R. 85.

[5] [1953] Ch. 382; [1953] 1 All E.R. 951.

[6] [1926] 1 K.B. 492; 42 T.L.R. 287.

[7] [1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601.

In the present case, by a contract dated November 28, 1955, the Waites agreed to purchase the freehold property, 8, Church Rise, Lewisham, from Colonel George Sinclair (who is the manager of the plaintiff company) for the price of £2,300. By the terms of the contract the vendor agreed to leave on mortgage the sum of £1,700 repayable over a period of 12 years at 6 per cent. interest by monthly instalments of principal and interest of £16 18s., and the mortgage deed was to be in the form already agreed. The National Conditions of Sale were incorporated in the contract, and condition No. 7 provides that if the purchaser is let into occupation of the property before the actual completion of the purchase, then, as from the date of his going into occupation and until actual completion, the purchaser shall be the licensee and not the tenant of the vendor.

Completion was to be on or before December 19, 1955, but in fact completion took place on December 30, 1955. The property was registered with absolute title under the Land Registration Act, 1925. On December 30, 1955, a transfer in accordance with the requirements of the Act was executed by Colonel George Sinclair in favour of the Waites, and on the same day a registered charge was executed by the Waites in favour of the plaintiff company to secure the principal sum of £1,700 with interest at 6 per cent. per annum repayable by monthly instalments of £16 18s. over a period of 12 years. There was the usual provision making the whole balance secured immediately payable in case of default in payment of two consecutive instalments. The statutory powers of leasing were not excluded or limited by the charge. Both these transactions were completed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. In regard to all these matters the same solicitors acted for Colonel George Sinclair and the plaintiff company.

On July 12, 1956, instalments being in arrear, the plaintiff company started proceedings against the Waites, and on October 10, 1956, obtained judgment against them for £1,655 10s. 10d. and costs. On July 26, 1956, the plaintiff company appointed a receiver. As a result of the receiver's attempts to collect rents, the claims of the last four defendants, Mr. and Mrs. Neill, Frederick Spurling and Alexandrina Hitchen, came to the notice of the plaintiff company. Mrs. Neill does not claim to be a tenant.

There are three flats in the property, Mr. and Mrs. Neill are in the occupation of the ground floor flat. As a result of seeing an advertisement of unfurnished flats, Mrs. Neill went to the Waites' office and was taken to see a flat at 183, Devonshire Road, Forest Hill. She was told that the rent was £2 11s. 6d. a week (inclusive of rates) and was asked for three years' rent in advance. Accordingly she paid by cheque to the Waites the sum of £401 15s., and received from them a receipt dated October 11, 1955, for that sum " as advance rent." The receipt stated that this was payable to the Waites as " stakeholders " and that moneys were deemed to be returnable in the event of non-acceptance of tenancy by either party. It was also stated that at the end of the advance term, rent was to be paid weekly or by mutual arrangement, and that the £10 10s. letting fee was not payable until the tenant was accepted and received the key. Some time later, however, Mrs. Neill was told by the Waites that she could not have the flat, and was offered the flat at 8, Church Rise. After considerable trouble with the Waites over the preparation of the flat for occupation, during which period Mrs. Neill had a baby, the Neills managed to get into occupation on December 17, 1955. The Neills were told that the rent of this flat would be 2s. a week more than the one previously seen, making a weekly rent of £2 13s. 6d. Neill wanted some record of their tenancy, and after a good deal of trouble he obtained from the Waites on January 30, 1956, a rent book containing receipts for weekly rents of £2 13s. 6d. for three years, but the last six entries were cancelled, as Mr. Neill refused to pay any more money down in respect of the increased amount of the rent due to the extra 2s. a week.

As a result also of an advertisement, Spurling called on the Waites on August 22, 1955, and was shown a flat at 6, Sydenham Park, which was said to be available at a rent of 36s. per week. He paid a deposit of £25 and on August 26, 1955, he paid a further sum of £290 18s., making a total of £315 18s. All this was paid in cash, and he was given a receipt in similar terms to that given to the Neills. His wife, however, did not like the flat, and subsequently they were shown a number of other flats. Eventually they were shown a flat on the first floor of 8, Church Rise, Lewisham, for which they were told the rent would be higher. Spurling did not object to that, but said that he could not pay any more in advance and so the Waites agreed to reduce the period for which the rent was paid in advance. After completion of decorations Mr. and Mrs. Spurling managed to get into occupation on December 16, 1955. Subsequently they were given a rent book showing that Spurling had paid £315 18s. for rent in advance at the rate of 49s. 6d. per week inclusive of rates from December 16, 1955.

Mrs. Alexandrina Hitchen, as the result of the Waites' advertisement, telephoned and was given the Waites' address. Accordingly her sister, Mrs. Taylor, went there and was taken by one of the Waites to 8, Church Rise, and was shown a flat, the rent of which was to be £2 0s. 6d. per week inclusive, three years' rent being asked in advance. Mrs. Taylor paid £100 to the Waites as a " holding deposit " on behalf of her sister. Mrs. Hitchen called on the following day, October 19, and was shown the flat (which was on the top floor) and was told that she could occupy it when it was completed—in a month or six weeks. Accordingly she gave the Waites a cheque for £315 18s., and was told there would be a letting fee of £10 10s., when she received the key. She received the key about a month later by post, but she had considerable trouble in getting the Waites to complete the decorations. Finally, with the assent of the Waites as a result of an ultimatum from Mrs. Hitchen, it appears, Mrs. Hitchen moved her furniture into the flat on December 27, 1955, and on December 28 she went in and spent a night there. She then fell ill, however, and went to her sister to be looked after. When, later, she received a rent book, it contained receipts for a weekly rent of £2 0s. 6d., starting on December 31, 1955, and ending with an entry for December 24, 1958.

The question arises, therefore, whether these defendants have tenancies of their respective flats, which are effective against the claim of the plaintiff company to an order for possession of the property.

Now, it is to be observed, first of all, that this is not a case where the question depends on the exercise by the mortgagors of the statutory powers of leasing conferred on mortgagors in possession by the Law of Property Act, 1925. In my view, it is clear that, in the case of each of the three tenants, there was an oral letting completed by entry on the part of the tenant before the date of the mortgage to the plaintiff company. This means, of course, that the letting was before the Waites' title was completed by the conveyance of the legal fee simple to them by Colonel George Sinclair on December 30, 1955, which was the date also of the mortgage. But, as the tenants were in possession before that date, there was a completion of their title, when the landlords received the legal estate, which preceded the mortgage to the plaintiff company: see *Woolwich Equitable Society* v. *Marshall*[1] and *Church of England Society* v. *Piskor.*[2] I am satisfied that the tenancies were, in each case, completed by entry before December 30, 1955. The facts that Mrs. Hitchen left the day after her entry because of her illness, and was charged no rent for the few days before December 31, 1955, seem to me to be immaterial.

Unless, therefore, the payment of the rent in advance created some objection, it seems to me that the tenancies were overriding interests prevailing over the plaintiff company's title under the Land Registration Act, 1925, as provided by section 20 (1) of that statute.

A point, however, has been taken on behalf of the plaintiff company on the terms of section 27 of the Land Registration Act, 1925. Section 19 (1) of the Act provides that the transfer of the registered estate in the land or part thereof shall be completed by the registrar entering on the register the transferee as the proprietor of the estate transferred, but until such entry the transferor shall be deemed to remain proprietor of the registered estate. Section 25 provides for the proprietor of any registered land creating a charge over the land by deed. Section 26 provides that the charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge. Section 27 provides that a registered charge shall, unless made or taking effect by demise or sub-demise, take effect as a charge by way of legal mortgage. Subsection (3) of this section provides that any such demise or sub-demise or charge by way of legal mortgage shall take effect from the date of the delivery of the deed containing the same, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge.

The argument is, as I understand it, that the result produced by the subsection is that until registration the Waites had not got the legal estate, but the plaintiff company, as mortgagees, had got a legal charge from the date of execution of the mortgage. This argument has not been put forward in any previous case, so far as I know, and it does not seem to me to be sound. I do not think that the subsection is dealing with the matter of legal estates or interests, but the form of a registered charge, and is simply designed to secure that the demise or subdemise (or the equivalent rights in the case of a charge by way of legal mortgage) begin from the date when the charge is executed. In any case, the tenancies of the defendants in possession began prior to the date of the execution of the charge and so would, if not invalid, be effective against the plaintiff company under section 20 (1) of the Act.

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[1] [1952] Ch. 1; [1951] 2 T.L.R. 783; [1951] 2 All E.R. 769.

[2] [1954] Ch. 553; [1954] 2 All E.R. 85.

To complete the references to the Land Registration Act, 1925, the enumeration of overriding interests in section 70 should be mentioned. This includes (section 70 (1) (*g*)): " The rights " of every person in actual occupation of the land or in receipt of " the rents and profits thereof, save where inquiry is made of " such person and the rights are not disclosed." There is also a reference in section 70 (1) (*k*) to " Leases for any term or interest " not exceeding twenty-one years, granted at a rent without " taking a fine." " Lease " includes a tenancy, but I think that this provision must be aimed at terms created by a document, as an oral letting completed by possession appears to be covered more appropriately by the previous provision (*g*) which I have mentioned.

The principal argument on behalf of the plaintiff company was that the payment of the large sums, supposed to represent rent in advance, were, in fact, premiums and were rendered illegal by the provisions of the Rent Acts. Therefore, it is said, the tenancies of the defendants were unlawful and cannot prevail, as the defendants who are in occupation are parties to the illegality. There are two propositions therefore: (1) the payments were premiums, and (2) being unlawful exactions by the landlords (the Waites) the tenants have no lawful tenancies.

It should be observed that there is no evidence that the weekly rents of £2 13s. 6d., £2 9s. 6d., and £2 0s. 6d., were in excess of the amounts recoverable as rent in view of the restrictions of the Rent Acts. In this case, at any rate, therefore, it would appear that the Waites were not attempting to recover excessive rents. They were, presumably, desirous of anticipating the rents payable over a period, with the object of producing lump sums, either in order to finance their purchase operations, or with the object of making a quick fortune and a departure with their gains.

It is necessary now to examine the authorities, some of which involve other operations of the Waites.

In *City Permanent Building Society* v. *Miller*[3] the Court of Appeal had to consider a case where a landlord (who purchased and mortgaged registered land) extracted three years' rent in advance from a prospective tenant. The circumstances, however, were not similar in certain important respects to those of the present case. By a document of October 15, 1950, the landlord acknowledged the receipt of £228, being three years' rent at 30s. per week in advance, and also agreed to grant to the tenant an unfurnished tenancy of the premises "for three years from "October 16, 1950, and thereafter on a weekly basis, at a rental "of 30s. per week." The tenant, however, did not go into occupation of the premises until January 15, 1951. By that time the landlord had completed his purchase of the premises, and a mortgage of them to the society. The mortgage was dated January 4, 1951, and the landlord was registered as proprietor of the premises and the society was registered as owner of a charge on January 11, 1951. In order to claim the benefit of an "overriding interest," it is plain that the tenant was compelled to rely on section 70 (1) (*k*) as a lessee at a rent without a fine. The decision of the Court of Appeal was against the tenant on the ground that at best the tenant had merely an executory agreement for a lease and not anything effective to create a term. It was unnecessary to decide whether the sum of £228 was a premium. Lord Evershed M.R. and Jenkins L.J. therefore expressed no opinion on the point. Lord Evershed M.R. said[4] (after referring to certain statutory definitions): "when regard "is also had to the ordinary sense of the words, there is much "to be said for the view that this sum, expressed to be an "advance payment of 30s. a week rent over three years, is "neither a 'fine' nor a 'premium.' On the other hand, it was "obviously a device, expressed in a particular way, on the "mortgagor's part to get a lump sum, and to substitute a lump "sum for a recurring weekly payment during the period from "October 16, 1950, to October 16, 1953. I do not wish to lend "any encouragement to the consequences which might flow from "a decision of this court that a lump sum paid like this, so as to "cover the financial obligations of the tenant for three years, was "not capable of being regarded as a fine or premium and thereby "to encourage persons of the mortgagor's calibre to enter into "transactions of this sort. I prefer for myself, therefore, to "express no view one way or the other upon the particular point "which commended itself to the judge, for I do not think it "necessary that I should." Jenkins L.J. also reserved his opinion on the point. Hodson L.J. expressed[5] an opinion more favourable to the view that the payment was a premium or fine, and added that " the tenant then could never have an ' overriding " ' interest ' consisting of an equitable right to specific performance, because the exaction of a premium by the mortgagor " would itself be a criminal offence, and the tenant would be a " party to the crime (see the Landlord and Tenant (Rent Control) " Act, 1949, s. 2)."

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[3] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

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[4] [1952] Ch. 840, 847.

[5] Ibid. 855.

The question whether the tenant was affected by the illegality was not argued, it would seem, and I infer that the Lord Justice assumed that the illegality would affect the tenant as well as the landlord, without having considered the matter more fully. I have had, however, the advantage of Mr. Stogdon's careful argument on this point.

Woods v. *Wise* [6] is a decision of the Court of Appeal, on a different kind of case, but it incidentally brings in the question of what is a premium. The standard rent of a flat was £263 10s. a year. The tenant did not want to pay so high an annual sum and preferred to pay an annual rent of £190 and a sum of £850 (described as " commuted rent ") which represented the balance of the standard rent, discounted for payment in advance, and was granted a lease for 14 years. The tenant then attempted to recover the £850 as a premium paid contrary to the provisions of the Act of 1949. The action failed because the tenant failed to show that the landlord had " required " payment of the sum as a " condition " of the granting of the lease. Romer L.J.[7] made some observations indicating his view that, while in certain circumstances and to a limited extent the demand of some prepayment of rent might be lawfully made by a landlord, the requirement of payment of substantially the whole of the standard rent in advance as a condition of granting a 14 or 21 years' lease or some other term of years would be within the scope and object of section 2 of the Act of 1949 and unlawful.

Hughes v. *Waite* [8] was a case before Harman J. concerning the operations of the same Waites, two of whom were stated to have fled the country and the third to be ill. The circumstances of this case differed from those of the present case, in that (1) the bargains were made before the Waites acquired any interest in the property and there was no evidence of any contract by the Waites to purchase before the date of completion, which was October 26, 1955, when a registered land charge was also executed;

[6] [1955] 2 Q.B. 29; [1955] 1 All E.R. 767.

[7] [1955] 2 Q.B. 29, 55.

[8] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

(2) though the agreements with the alleged tenants were made before the date of the charge, they were not let into occupation until October 31, 1955, which was after the date of the charge, though before its registration on November 14, 1955. The rights of the parties, therefore, depended on the provisions of section 99 (6) of the Law of Property Act, 1925, which authorizes a mortgagor in possession to make leases "at the best rent that "can reasonably be obtained, regard being had to the circum- "stances of the case, but without any fine being taken." Harman J. held that the alleged tenants were mere occupiers on sufferance, and also that they had no valid tenancies at a rent as required by section 99 of the Law of Property Act, 1925, since, although the amounts were calculated by reference to so many weeks' or years' rent, no periodical payment of rent was prescribed; and the payments were foregifts or fines.

Hitchcock v. *Waite*,[9] before Vaisey J., was another example of the methods of these Waites. Unfortunately the case appears only to have been reported (and, of course, in an abbreviated form) in *The Times* newspaper of May 30. It is difficult to discover the exact facts and the precise reasons which led to the conclusion reached by the judge. It appears that in November, 1955, the plaintiffs agreed to sell to the Waites the property for £2,000, of which £1,330 was to be left on mortgage. The transaction was completed in February, 1956. Meanwhile the Waites agreed to let the three flats in the property to three persons who paid sums equivalent to three years' rent in advance. Apparently, unlike the situation in the present case, the rents must have been calculated at rates above the standard or recoverable rents, as one of the three occupiers obtained a judgment in the county court for the recovery of a portion of the sum paid by him, though this judgment was never satisfied. Vaisey J. held that the rent paid in advance was plainly a premium and so unlawful under the provisions of the Rent Acts. He is reported as saying that its exaction, moreover, was a criminal offence by the Waites to which each of the so-called tenants would be a party, although he added that he could not fairly attach any moral blame to them. In this I infer that the judge was merely following the assumption made by Hodson L.J. in *City Permanent Building Society* v. *Miller*,[10] and I think it is probable that no argument was addressed to him on this point.

These are the most relevant cases, but I should add that the Court of Appeal seem to have been loth to lay down any firm principles in cases of this character, and have indicated that each case may well depend on the particular facts: see, for instance, *Rush* v. *Matthews* [11] and *Samrose Properties* v. *Gibbard.*[12]

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[9] *The Times*, May 30, 1957, p. 15.

[10] [1952] Ch. 840.

I now turn to consideration of the two questions which I have mentioned, in regard to the facts of this case. The first is—were the sums paid premiums?

I think that it cannot be a premium or unlawful to require payment of rent in advance in every case. After all, it is well known that rents are often required to be paid in advance where the circumstances suggest that the tenant is not a very stable character. But it may well be that the demand of several years' rent in advance cannot be justified on any such ground. At what point is the line to be drawn? I apprehend that one test may be that if the demand is obviously a device to get over some provision of the law, and not merely a bona fide attempt to prevent the landlord being deprived of the ability to recover his rent, the transaction may be scrutinized and be shown to be something other than what it is called. In the circumstances of the present case I am prepared to come to the conclusion that the payments were, as Romer J. said in *Woods* v. *Wise*,[13] within the scope and object of section 2 of the Rent Act of 1949, and premiums unlawfully demanded by the landlords.

If that is so, then it is plain that the landlords have committed an offence under the Rent Acts. But does it follow that the tenancies of the tenants are thereby rendered invalid, so that they can be turned out and be deprived of the property which they had expected to enjoy? In my view, a consideration of the terms of the Rent Acts leads to a different conclusion. First of all, I should state what I find to be the true effect of the dealings between the Waites and the tenants in the present case. In my view, the effect was that the Waites were saying: "We have "unfurnished flats to offer at weekly rents, inclusive of rates, "but you will have to pay three years' rent in advance." The prospective tenants, desperate to obtain accommodation, accepted this demand and handed over lump sums of money to the Waites. Eventually they were let into occupation of flats, but not until then, or just before, were the weekly rent, the date of commencement of the tenancy, and the other terms of the tenancies settled. By that time the Waites had an interest in the property under their contract to purchase. Neill and Spurling actually paid down their sums of money in regard to other flats, and only

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[11] [1926] 1 K.B. 492.

[12] Judgmts. of C.A., 1957, No. 133.

[13] [1955] 2 Q.B. 29.

Mrs. Hitchen had the same flat in view all along, but I do not think that there is any materiality in this difference.

Secondly, I would observe that the Rent Acts are indubitably Acts passed for the protection of tenants and to restrain the demands of landlords. The material provisions of the Acts appear to be these. Section 2 (1) of the Act of 1949 (which replaced the repealed provisions of section 8 (1) of the Act of 1920), provides as follows: [His Lordship read subsections (1) and (6) and continued:]

It is clear that it is the act of the landlord which is forbidden and is an offence under these provisions. But the Acts treat the tenant as a victim, as the above-mentioned subsection, as well as the following provisions, show.

Subsection (5) of section 2 of the Act of 1949 gives the tenant the right to recover the amount of a premium which could not lawfully have been required.

Section 14 (1) of the Act of 1920 makes sums unlawfully obtained by a landlord recoverable from the landlord, and provides that any such sum may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord. There is a similar provision in the Act of 1939. And it has been held that a tenant may recover a premium payment which he has made to a landlord, although he was aware that the payment of a premium was unlawful: *Gray* v. *Southouse*,[14] in which Devlin J. considered the matter very fully.

It is clear that these Acts do not treat the tenant as tainted by the offence committed by the landlord, and regard him as a person to be protected.

In the result, in my view, if the tenants in the present case were compelled unlawfully to pay a premium to the Waites, this does not affect the validity of their tenancies, and they are entitled to deduct from their rents the amounts which they have paid, unless they elect to attempt to recover from the Waites the proportion referable to the future (which presumably is unlikely).

Accordingly, I am unable to make an order for possession in favour of the plaintiff company.

Judgment for the defendants.

Solicitors: *A. Kramer & Co.; Humphrey Razzall & Co.*

J. L. D.

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[14] [1949] 2 All E.R. 1019.

GRICE AND ANOTHER v. DUDLEY CORPORATION.

[1956 G. No. 440.]

1957
June 5, 6, 7.

Upjohn J.

Compulsory Purchase—Compulsory purchase order—Notice to treat—Validity—Abandonment of rights—User of land for purpose for which not acquired—Attempt to enforce notice after five years' delay—Whether notice exercise of compulsory powers—Lands Clauses (Consolidation) Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 123.

In 1937 the defendant corporation made a compulsory purchase order, pursuant to the Public Works Facilities Act, 1930, which provided that the Lands Clauses (Consolidation) Act, 1845, should apply to such order, authorizing them to acquire the property of K. for the purposes of road widening and erecting a market hall. On December 2, 1938, the Minister of Transport approved the scheme and the corporation served a notice to treat dated January 4, 1939, on K. In July, 1939, the parties agreed that the compensation for the property should be £5,700 and a further £300 for fixtures and fittings. Owing to the outbreak of war in September, 1939, the matter lapsed. On December 28, 1942, K. died, having by her will appointed the plaintiffs to be her executors. Between 1951 and 1954 various new schemes of improvement differing substantially from that comprised in the 1937 order were proposed by the corporation but no final plans were made. In August, 1954, the corporation raised the question of purchasing the plaintiffs' property at the price agreed in 1939, to which the plaintiffs objected, and in 1955 the corporation threatened to pay the compensation money into court and execute a deed poll vesting the property in themselves pursuant to sections 76 and 77 of the Lands Clauses (Consolidation) Act, 1845.

In an action by the plaintiffs for a declaration that the notice to treat, dated January 4, 1939, was no longer valid and effective, it being admitted by the corporation that their plans for development although not yet finalized did not include either the road widening or the provision of a market hall:—

Held, (1) that the service of a notice to treat was for the purposes of section 123 of the Lands Clauses (Consolidation) Act, 1845, an exercise of compulsory purchase powers; and, therefore, the corporation had served a valid and effective notice, exercising within the required period compulsory powers, which created between the parties a quasi-contract for the sale of the property in question.

Marquis of Salisbury v. *Great Northern Railway Co.* (1852) 17 Q.B. 840 applied.

Guest v. *Poole and Bournemouth Railway Co.* (1870) L.R. 5 C.P. 553 and *In re Uxbridge and Rickmansworth Railway Co.* (1890) 43 Ch.D. 536 distinguished.

(2) That where a promoter evinced an intention to abandon rights given him by a notice to treat, the owner was entitled to treat those rights as abandoned; and that the fact that the corporation were attempting to acquire the property for purposes

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GRICE *v.* DUDLEY CORPORATION.

substantially different from those set out in the compulsory purchase order of 1937, amounted to an abandonment of that order, and, thus, an abandonment of their rights under the notice to treat which was no longer valid or of legal effect; and that, accordingly, the defendants had no powers under or by virtue of the order to acquire the plaintiffs' property.

Dictum of Sir George Jessel M.R. in *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.* (1873) L.R. 17 Eq. 142, 149 applied.

(3) That, in any event, as the corporation were endeavouring so to acquire the property for a purpose not yet finally established, they could not compel the plaintiffs to submit to a notice to treat issued under a compulsory purchase order consistently with the general principle that statutory powers should be exercised for the purpose for which they were conferred, and that property acquired thereby should ultimately be used for the purpose for which it was acquired.

ACTION.

The plaintiffs claimed a declaration that a notice to treat, dated January 4, 1939, for the purpose of exercising compulsory purchase powers was no longer valid or effective.

The following facts are summarized from the judgment. The plaintiffs were the executors of Norah Kendall, formerly of 19, Hall Street, Dudley, in the County of Worcester, who died on December 28, 1942. For some 50 years Mrs. Kendall had carried on on her premises a business of poulterer and fishmonger and her executors continued to carry on that business there. No. 19, Hall Street, was part of an important island site in the centre of Dudley, being bordered by Hall Street on the south-west; Birmingham Street on the south-east; Fisher Street on the north, and Castle Street on the north-west. In 1937 the defendant corporation were minded to take advantage of the Public Works Facilities Act, 1930, which was passed with a view to the relief of unemployment and to give local authorities a speedy procedure for promoting schemes of work to that end. The schemes had to be approved by Parliament, and when the scheme was approved, the Act empowered the corporation to make compulsory purchase orders to carry out the scheme. Objections might be made to such orders, in which case a public local inquiry had to be held, and it was then a matter for the Minister—in the present case the Minister of Transport—to confirm the order with or without modifications or to disallow it. It was provided that the Lands Clauses Act—including the Lands Clauses (Consolidation) Act, 1845 (hereinafter called "the Act") with modifications and adaptations, should apply to such compulsory purchase orders, and for the purposes of the Act the compulsory purchase order should be deemed to be the special Act and the local authorities should be deemed to be the promoters of that Act.

In 1937 the development proposed for the island site was to widen Hall Street and to build a central market, and in that year the corporation made a compulsory purchase order to carry out the scheme. The order was duly published and the map that was referred to was, as required by the Act, open to inspection, and notices of objection to the order were received, including one from Mrs. Kendall. A public inquiry was held by an inspector appointed by the Minister on May 27, 1938, and the Minister approved the order on December 2, 1938. The material terms of the order were as follows:

"Public Works Facilities Act, 1930. Dudley Hall Street "(Compulsory Purchase) Order, 1937.

"The Mayor, Aldermen and Burgesses of the County Borough "of Dudley acting by the Council hereby make the following "Order:—

"(1) Subject to the provisions of this Order the above-named "Council are hereby authorized to purchase compulsorily for the "purpose of widening, enlarging and improving Hall Street, "Castle Street, Fisher Street and Birmingham Street, in Dudley "aforesaid, and for the improvement and development of the "lands abutting on or adjacent to the said Hall Street, Castle "Street, Fisher Street and Birmingham Street, the lands which "are described in Part I of the Schedule hereto and also subject "to the provisions of this Order the above-named Council are "hereby authorized to purchase compulsorily for the purpose of "providing a Market Hall in Dudley aforesaid the lands which "are described in Part II of the Schedule hereto, and all which "said lands are defined and coloured on a map marked 'Dudley "'Hall Street (Compulsory Purchase) Order, 1937' and sealed "with the common seal of the Council and deposited at the "offices of the Council situate at the Council House, Dudley. "Provided that the said map shall be disregarded and that for "references thereto in this Order there shall be substituted "references to a map marked 'Dudley Hall Street (Compulsory "'Purchase) Order, 1937' and signed by P. Wilson, an Assistant "Secretary of the Ministry of Transport and deposited at the "offices of the Council."

Part I of the Schedule was headed "Lands required for "widening and improving streets and for developing and "improving frontages," and the property of Mrs. Kendall was numbered 11 on the map. Part II was headed "Lands required "for the provision of a market hall" and, again, Mrs. Kendall's property was marked and numbered 11. The map signed by "P. Wilson" showed this one island site. On the south-west side it was clear that the intention was this: there was to be an improvement line which was marked, and the shops and buildings to the south-west of that line were to be pulled down so that Hall Street would be greatly enlarged. There was to be a line of shops behind the improvement line. Behind that, and marked with a black line, was the area which was then intended to be the market hall.

The corporation met on January 3, 1939, when the town clerk was authorized to serve the requisite notice to treat and take all necessary steps thereon. He was further authorized to make application to the Minister of Transport for the requisite grant in connexion with the road widening scheme, and that was headed "Dudley Hall Street (Compulsory Purchase) Order, "1937." The notice to treat, which was in common form, was dated January 4, 1939, and served on Mrs. Kendall, or her solicitors, on the following day. The notice was registered as a land charge in the Land Charges Register kept under the Land Charges Act, 1925. On March 3, 1939, Mrs. Kendall's solicitors delivered the particulars of her claim amounting to £9,843 19s. 6d. plus solicitors' charges and valuers' fees.

By July, 1939, the parties had agreed that the compensation for the premises should be £5,700 and for the fixtures and fittings £300, and that in addition Mrs. Kendall should be paid compensation for and in respect of loss of trade and disturbance and the charges and expenses of her surveyors and solicitors. The corporation's valuers then invited Mrs. Kendall's valuers to submit to the town clerk a draft contract, and the draft was submitted on September 13, 1939. By then, owing to the outbreak of war, the loan sanction for the proposed road widening was in general withdrawn, though application was made for the limited authority of the loan sanction where owners desired completion. In 1940 Mrs. Kendall was pressing for completion while the corporation was anxious to delay completion. The parties could not agree, and the matter ended in deadlock in June, 1941.

Between July, 1951, and 1954, the corporation's views on the development of the island site changed substantially. In July, 1951, a new plan was put forward which omitted altogether the widening of Hall Street. In November, 1951, there was a plan to acquire only the rear portion of 19, Hall Street, with a view to tidying up the surrounding area. Negotiations, which were concerned only with alterations to the rear of the plaintiffs' property, followed but came to nothing.

In 1954 another modified scheme for improvement of the island site was produced, this providing for two bus-loading bays, a new service road and omitting any new market hall or a substantial widening of Hall Street. None of these plans ever received the formal approval of the Council.

On August 27, 1954, the question of the purchase of the plaintiffs' property at the pre-war price was raised by the town clerk with the plaintiffs' solicitors. Negotiations followed during which the plaintiffs maintained that the corporation had abandoned the compulsory purchase order. The town clerk in 1955 threatened to exercise the powers under sections 76 and 77 of the Lands Clauses (Consolidation) Act, 1845, by paying compensation into court and executing a deed poll vesting the property in the corporation on the footing that the plaintiffs had failed to make title or convey the property to the corporation. On March 13, 1955, the plaintiffs issued the writ in this action claiming a declaration that the notice to treat served by the corporation on January 4, 1939, was no longer valid and effective. The corporation agreed, following the issue of the writ, not to attempt to exercise their alleged powers under sections 76 and 77 until the action had been determined.

At the trial it was admitted by the town clerk that the present proposals for the development of the site, though not finalized, were different from those contemplated by the 1937 order. It was conceded that the corporation did not have it in mind to use the plaintiffs' property for the widening of Hall Street or for providing a market hall.

Percy Lamb Q.C. and *G. A. Grove* for the plaintiffs. (1) The only step taken by the defendants to put into operation their statutory powers of compulsory purchase is the notice to treat. That, being accepted by the recipient who showed herself willing to treat, is not an exercise of the powers of compulsory purchase, and, therefore, by section 123 of the Lands Clauses Consolidation Act, 1845, read together with paragraph 5 of Part II of the First Schedule to the Public Works Facilities Act, 1930, the defendants cannot now put their compulsory purchase powers into force: *Guest* v. *Poole and Bournemouth Railway Co.*[1] and *In re*

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[1] (1870) L.R. 5 C.P. 553.

Uxbridge and Rickmansworth Railway Co.[2] (2) Assuming that the defendants are right that there is a binding contract, made in 1939, the defendants' remedy is to be found in that contract, which does not incorporate the Act of 1845 and powers thereunder. They have elected to rely on their contractual rights in place of statutory powers. If there is a contract, the defendants cannot enforce their compulsory powers: see *Central London Property Trust* v. *High Trees House Ltd.*[3] and *Vine* v. *National Dock Labour Board.*[4] (3) The purpose for which the compulsory purchase order was made—to widen the street and build a market hall —has been abandoned, with the result that the defendants cannot now acquire lands under the order. (4) The defendants have slept on their rights and are now estopped. As to the effect of the corporation's delay, see *Hedges* v. *Metropolitan Railway Co.*[5]; *Richmond* v. *North London Railway Co.*[6]; *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*[7]; *Hughes* v. *Metropolitan Railway Co.*[8]; *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[9]; *Tiverton and North Devon Railway Co.* v. *Loosemore*,[10] and *Watts* v. *Watts.*[11] If, after service of the notice to treat, the acquiring authority so conducts itself as to lead the owner to believe that the land will not be taken under compulsory powers, equity will prevent compulsory acquisition.

Geoffrey Cross Q.C. and *H. E. Francis* for the corporation. For the purposes of section 123 of the Lands Clauses Consolidation Act, 1845, the service of a notice to treat is an exercise of compulsory powers: see Halsbury's Laws of England, 3rd ed., vol. 10, p. 65, and *Marquis of Salisbury* v. *Great Northern Railway Co.*,[12] *per* Campbell C.J. If the plaintiffs' first submission is right, then *Tiverton and North Devon Railway Co.* v. *Loosemore*[13] must be wrong. The plaintiffs' second submission—that, assuming that there was a contract, the corporation are estopped from enforcing their remedies under sections 76 and 77 of the Act of 1845—raises the question whether there was in fact a contract. Assuming that there was a contract brought into existence by the ascertainment of the purchase price, there is nothing in section 76 to preclude the corporation from proceeding under that section. The notice creates a quasi-contract; the landowner becomes obliged to sell and the corporation to buy at a price to be fixed. Neither can resile without the other's consent. The contract so created is one of which the courts would grant specific performance. In this case the fixing of the purchase price was not provisional, and the quasi-contract created by the notice to treat and the agreement as to price could have been enforced by the corporation: see Fry on Specific Performance, p. 62, paras. 137–138, and *Mason* v. *Stokes Bay Pier and Railway Co.*[14] The corporation could have invoked section 77 in 1941. Applying the *Tiverton* case[15] to the present, here there is no question of election. The parliamentary contract is not affected by the abortive negotiations for a formal contract. The plaintiffs' submission as to election is not well founded: see section 40 of the Law of Property Act, 1925. If there was no binding contract, then the notice to treat is still in force.

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[2] (1890) 43 Ch.D. 536, 561–564, 567–568.

[3] [1947] K.B. 130; [1946] 1 All E.R. 256.

[4] [1956] 1 Q.B. 658, 668–671, 673, 677, 679; [1957] A.C. 488; [1956] 1 All E.R. 1; [1956] 3 All E.R. 939.

[5] (1861) 3 L.T. 643.

[6] (1868) L.R. 5 Eq. 352; L.R. 3 Ch. 679.

[7] (1873) L.R. 17 Eq. 142.

[8] (1877) 2 App.Cas. 439, 442, 447.

[9] (1888) 40 Ch.D. 268, 285.

[10] (1884) 9 App.Cas. 480.

[11] (1873) L.R. 17 Eq. 217.

[12] (1852) 17 Q.B. 840, 852.

[13] 9 App.Cas. 480.

As to abandonment, this question is independent of lapse of time. No change in the corporation's attitude can of itself destroy the effect of the notice to treat, because, if it did, the result would be that the landowner could not compel the corporation to acquire the property: see *Hedges* v. *Metropolitan Railway Co.*[16] That was a clear case of estoppel, but estoppel is not pleaded here.

If the notice was good and there was a genuine intention to use the property as stated in the notice, then the authority must proceed in a reasonable time. A long unexplained delay would be unreasonable, but here there was no complaint from the landowner, and there was the intervention of the war, so that the inactivity on the corporation's part was not unreasonable. They are not, therefore, estopped by reason of laches. A public authority should be treated more leniently by the courts than a railway company: see *Rolls* v. *School Board for London.*[17] If the notice to treat was valid, then a subsequent change of mind on the part of the corporation as to the purpose for which the land was acquired does not make the acquisition of the land under the original notice ultra vires. If such acquisition were ultra vires, then it must follow that the landowner could not enforce compliance. If the doctrine of ultra vires is inapplicable, when will the court interfere by injunction? This would be a very difficult task, for every deviation is a question of degree. In this case the court has no jurisdiction to interfere, because the original notice was good. Alternatively, the deviation here is not sufficient to justify the court intervening to prevent acquisition.

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[14] (1862) 32 L.J.Ch. 110.

[15] 9 App.Cas. 480.

[16] 3 L.T. 643.

[17] (1884) 27 Ch.D. 639.

Lamb Q.C. in reply. *Guest* v. *Poole and Bournemouth Railway Co.*[18] was cited with approval by the Court of Appeal in the *Uxbridge* case.[19] The conflict between that line of cases and the *Marquis of Salisbury*[20] line of cases has never been resolved, and the Court of Appeal decision should be followed.

The only fair inference from the facts and evidence is that the original scheme was abandoned. It would be ultra vires to acquire the property now under the order when acquisition would not be for the purposes of that order: *Attorney-General* v. *Smethwick Corporation.*[21]

UPJOHN J. having stated the facts continued: The contentions put forward are these: first, the plaintiffs say that the service of the notice to treat is not, in itself, an exercise of compulsory powers of acquisition of land and, it being conceded that no other step to exercise such powers has been taken within the three years from the date of the special Act (that is the Order of 1937), no exercise of the power can now be valid having regard to section 123 of the Lands Clauses (Consolidation) Act, 1845. Secondly, if, contrary to the plaintiffs' submission, service of the notice is an exercise of such compulsory powers, it is no longer enforceable because (1) the notice to treat has been abandoned; or (2) the corporation are precluded from enforcing it by reason of their laches, acquiescence and the provisions of the Limitation Act, or (3) by leading the plaintiffs to suppose that it would not be acted on. Estoppel is also pleaded, but Mr. Lamb, on behalf of the plaintiffs, does not rely on any common law case of estoppel.

Upon the first point, provision is made for the service of the notice to treat by section 18 of the Lands Clauses (Consolidation) Act, but the operation of a notice given under that section is now so well settled that I need not read it. It may have any one of the following effects: First, the landowner may be a willing vendor and the parties may agree upon the price or compensation and enter into a binding agreement of sale and purchase whence the usual results flow as in the case of any other contract of sale and purchase. Secondly, the landowner may be a willing seller but the parties may fail to agree upon the price, in which case either party can proceed to have the compensation payable assessed by the appropriate authority; originally it was by arbitration or by summoning a jury; then by an official arbitrator under the Acquisition of Land Act, 1919, and, finally, now by the Lands Tribunal. In this case there is a limited right in the acquiring authority to withdraw the notice to treat on seeing the claim for compensation delivered by the landowner: see the Acquisition of Land Act, 1919, section 5 (2). The third position is this: the landowner may be entirely hostile, in which case the promoter can proceed to have compensation assessed, and if the landowner refuses or neglects to make title, or to convey the land, the promoter can pay the compensation money into court and execute a deed poll vesting the property in himself. (That is, by sections 76 and 77 of the Lands Clauses (Consolidation) Act.) The relationship between the parties thus created by the service of the notice to treat has sometimes been described as a quasi-contract. It is, further, clear that where the parties have agreed upon the compensation, or it has been assessed, but not before, the remedy of specific performance is open to either side: see Fry on Specific Performance, 6th ed., p. 62. That state of affairs has sometimes been referred to as a parliamentary contract.

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[18] L.R. 5 C.P. 553.

[19] 43 Ch.D. 536, 561.

[20] 17 Q.B. 840.

[21] [1932] 1 Ch. 562.

That, then, is the nature of the legal relationship created by the parties, and the question is whether the giving of such a notice is the exercise of compulsory powers of acquisition of land for the purposes of section 123 of the Act, which is in these terms: " And be it enacted, that the powers of the promoters of " the undertaking for the compulsory purchase or taking of lands " for the purposes of the special Act shall not be exercised " after the expiration of the prescribed period, and if no period be " prescribed not after the expiration of three years from the " passing of the special Act." There was, of course, no prescribed period in the special Act—that is, the compulsory purchase order. Apart altogether from authority, I should be of opinion that the service of a notice to treat is an exercise of a compulsory power, because it enables the promoter to proceed to acquire the land whether the owner likes it or not. However, it has been strenuously argued before me that the authorities compel me to come to the contrary conclusion, and some authorities on either side have been cited to me.

First of all in point of date is *Marquis of Salisbury* v. *Great Northern Railway Co.*[1] That is a direct decision in favour of the view that the service of a notice to treat is, for the purposes of section 123, an exercise of a compulsory power. That case was mentioned in the speeches of four of the Law Lords in *Tiverton and North Devon Railway Co.* v. *Loosemore*,[2] although they were dealing with a slightly different point, that is to say, whether entry upon land was an exercise of a compulsory power; nevertheless, it seems clear that the earlier decision received their general approval. On the other hand, the plaintiffs relied strongly on two cases, both in the Court of Appeal. The first is *Guest* v. *Poole and Bournemouth Railway Co.*[3] In that case a notice to treat was served by the company on a land owner. The action was for mandamus, to compel the company to issue a warrant of compensation pursuant to the notice which was given, but the company demurred and pleaded section 16 of the Act. That section provides that it shall not be lawful to put in force any powers relating to the compulsory taking of land until the whole capital is subscribed, which in that case, apparently, it had not been. It was held that section 16 was inserted for the protection of landowners and that the issue of a notice was a neutral proceeding. It was said that it might be an amicable proceeding or a hostile proceeding, or there might be an intermediate case where the parties were willing to buy and sell but did not agree on the price. It was held, for the purpose of section 16, that the notice to treat was not an exercise of compulsory powers and the plaintiff was entitled to his writ of mandamus. Much to the same effect is the subsequent case *In re Uxbridge and Rickmansworth Railway Co.*,[4] where, however, the actual point turned on the rather complicated provisions of the Companies' Abandoning Act, 1888.

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[1] (1852) 17 Q.B. 840.

I see no difficulty in reconciling these authorities. A notice to treat may, for the purposes of some sections of the Act, be an exercise of compulsory powers and, for the purpose of other sections, in certain circumstances, not an exercise of compulsory powers. I say " in certain circumstances," for it seems clear, for example, that in the *Poole and Bournemouth Railway Co.* case [5] had the plaintiff been entirely hostile the notice to treat would have been an exercise of compulsory powers—see the judgment of Brett J.[6]—and, accordingly, unenforceable having regard to the failure to comply with section 16. In my judgment, for the purposes of section 123, the service of a notice to treat is, for the reasons given in the *Salisbury* case,[7] an exercise of compulsory powers and, therefore, it was given within the required period.

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[2] (1884) 9 App.Cas. 480.

[3] (1870) L.R. 5 C.P. 553.

[4] (1890) 43 Ch.D. 536.

[5] L.R. 5 C.P. 553.

[6] Ibid. 559, 560.

So far, therefore, the result seems to me to be this: the promoters, i.e., the corporation, served a valid, effectual notice exercising compulsory powers which led to the creation of a legal relationship between the parties which I have already described. Once that notice was served, section 123 was out of the picture and no further period is laid down by statute within which the next step to acquire the property must be taken. In my judgment, however, the authorities to which I shall shortly refer establish the following propositions: first, the promoter exercising statutory powers must proceed to enforce his notice in what, in all the circumstances of the case, is a reasonable period. If he sleeps on his rights he will be barred if his delay is not explained. If it is explained, he will be allowed to enforce the notice providing it is equitable that he should do so in all the circumstances of the case. However, the oppression upon the owner of land in respect of which a notice to treat has been given cannot be wholly disregarded, however sound the reason for not proceeding to enforce it. Secondly, the promoter may evince an intention to abandon his rights given to him by the notice to treat, in which case the owner is entitled to treat those rights as abandoned. Thirdly, this court has an inherent jurisdiction to control the exercise of statutory powers if, but only if, it can see that the powers are being exercised not in accordance with the purpose for which the powers were conferred. In such a case it has the power, and the duty, at the instance of the Attorney-General on behalf of the public or of a person damnified, to restrain the further exercise of those powers not in accord with the special Act. These three propositions are, in point of law, distinct, but, in practice, they tend to merge one into the other, more particularly the first two, for unequivocal acts of abandonment seldom arise. The authorities I am about to quote show how closely connected these three propositions are. In support of the first proposition I must refer to *Richmond* v. *North London Railway Co.*[8] Lord Romilly M.R. said[9]: "It is also, I think, clear that the notice [the notice to "treat] given by the railway company to the landowner cannot "operate for an indefinite time: it must be acted upon within "a reasonable time or it must be deemed to be abandoned. "The difficulty is to determine what period of time is to be

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[7] 17 Q.B. 840.

[8] (1868) L.R. 5 Eq. 352.

[9] Ibid. 358.

"considered to be reasonable." He then went on to discuss the hardship upon a landowner who has a notice to treat hanging over him for an indefinite time, and then he said[10]: "It is "obvious that the notice is not to be operative for ever: it "follows, therefore, that some limit must be put to the time "within which it is to be operative: it further follows that this "limit of time must be a reasonable limit of time: and that "again resolves itself into the answer to be put to the question, "with which the courts of law have so often and in such a variety "of cases to deal—what is a reasonable limit of time as applic-"able to the class of cases in question?"

In that case there was a period set for the time within which the works must be completed, and he held that in those circumstances the time limit for the completion of the works was the end of a reasonable time. But the observations I have just quoted are all perfectly general in application and apply equally to a case where, as here, there is no time limit for completing the work, although it may be found, perhaps, more difficult to ascertain what, in all the circumstances of the case, is a reasonable time. Lord Romilly continued[11]: "It is obviously inequit-"able to permit the railway company for an indefinite time to "keep this notice over the head of the landowner, fettering his "enjoyment of his property, and it is no answer to say that the "landowner might insist on the railway company ascertaining the "price, for if that were true the rule of the court, if it can be "laid down, ought to apply to every case, and would include "that of the landowner who desires to keep his land, and not "to part with it for any price, if he can help it."

I read that because Sir George Jessel M.R., in a subsequent case, *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*,[12] seems to have taken a rather different view. He said[13]: "Now I have been unable to follow the argument as to the "notice to treat being got rid of by mere lapse of time. I do "not say that no lapse of time will be evidence of abandonment. "It must not be forgotten that the landowner can always force "the company on; it is not as if it was all on one side, and "the landowner may choose to do nothing, or may force on the "company." Then he considered the facts of that case and referred to the *Richmond* case.[14] I prefer the view of Lord Romilly to that of Sir George Jessel. Even in the last century, when values were reasonably steady, it seems hard to put it against the owner who does not want to be dispossessed that he has the right to force the company to dispossess him; but when you come to these days of inflation, it surely cannot possibly be put against an owner that he has the right to compel the company, the promoter, to go to arbitration. That is the very thing which the plaintiffs in this case are trying to avoid. If they send the matter to arbitration they are merely inviting the promoter to purchase their property at a pre-war price. It seems to me, therefore, that the circumstance that an unwilling vendor can compel completion of the purchase is not a matter which ought to weigh against the vendor and in favour of the promoter.

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[10] (1868) L.R. 5 Eq. 352, 359.

[11] Ibid. 360.

[12] (1873) L.R. 17 Eq. 142.

[13] Ibid. 149.

[14] L.R. 5 Eq. 352.

Much the same principle was stated by Earl Cairns L.C. in the *Tiverton* case [15]: "There have been cases in which a railway "company has given a notice to a landowner to treat for the "purchase of land and no further step has then been taken, "either by the company or the landowner, and the extended "period for completing the works has expired, and the question "has been raised, could the company in that state of things "proceed with its notice to treat, and assess the compensation "under the Lands Clauses Act? Were such a case now to arise, "I should be disposed to think, as I was disposed to think in "*Richmond* v. *North London Railway Co.*,[16] that, if nothing "more was done, and the company have slept upon their rights, "and certainly if the delay cannot be explained, they should be "held disabled from going on with any compulsory purchase, "and in such a case the landowner should, as I think, be held "to be disabled also. Both parties have been content to let "the time run out."

When the *Richmond* case [16] went to the Court of Appeal and came before Lord Cairns he dealt with the matter rather on the basis of the third proposition I have enunciated, and I shall deal with that in a moment. With regard to the second proposition, no authority really is required as the proposition is self-evident. Sir George Jessel M.R. in the *Ystalyfera* case [17] recognizes abandonment as a possible way of terminating the promoter's rights. The only difficulty is as to what acts evince an intention to abandon. It is a question of fact in each case.

Upon the third proposition Lord Cairns said this in the *Richmond* case [18]: "One of the best established objects of "the jurisdiction of this court is to take care that companies

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[15] 9 App.Cas. 480, 489.
[16] L.R. 5 Eq. 352.
[17] L.R. 17 Eq. 142.
[18] (1868) L.R. 3 Ch. 679, 681.

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"exercising powers under their Acts shall not exercise them "otherwise than for the purposes of the Act, and when there "is any ground for supposing that the powers are to be exercised "for any other purpose, the court should see whether the "company is really misusing its powers. Great latitude must "be given to the company and great faith to their statements "as to the land which will be required for any particular work, "and the court will not try the question with any great minuteness, and must place much reliance upon what the officers "of the company may say." Much to the same effect are the observations of Chitty J. in *Rolls* v. *School Board for London.*[19] In that case the judge pointed out[20] that, on the whole, local authorities are treated more tenderly than railway companies who may be, or at any rate in those days were, expected to work at a profit. The proposition is, further, well illustrated by *Attorney-General* v. *Hanwell Urban District Council.*[21] In that case the property had been actually conveyed to the urban district council but they were restrained from appropriating the property which they had acquired for one purpose—that was to make a sewage works—to an entirely different purpose, namely, a hospital, and they were restrained at the suit of the Attorney-General and the plaintiff, who was also damnified. It is, however, clear that if a promoter acquires property which he does not immediately require for the purpose for which it was acquired he can use it temporarily for other purposes, provided those purposes are not inconsistent with the authorized or permitted use. That appears from *Attorney-General* v. *Teddington Urban District Council.*[22] But it is clear that the property must be kept so that it may ultimately be used for the purpose for which it was acquired. Those two cases, I think, illustrate well the general proposition. The effect of the last two cases should, however, be taken now subject to the alteration in law by section 163 of the Local Government Act, 1933.

Finally, Lord Blackburn combined all these propositions in one statement in the *Tiverton* case[23]: "I do not think that the "analogy between an actual contract and a quasi-contract is com-"plete but I think it is so thus, for that neither side can by its "laches or misconduct take away from the other its right to

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[19] (1884) 27 Ch.D. 639, 642.

[20] Ibid. 643.

[21] [1900] 2 Ch. 377, 452; 16 T.L.R. 10.

[22] [1898] 1 Ch. 66; 14 T.L.R. 32.

[23] 9 App.Cas. 480, 496.

"enforce the performance of the contract or claim compensation "for its non-fulfilment; but either side may by its laches or misconduct deprive itself of all right to enforce the contract or "quasi-contract against the other. I do not see anything unjust "or contrary to principle in holding that if a company delays "completing a compulsory quasi-contract for purchase, till it "can no longer exercise the powers for the sake of which it was "entrusted with the power of compulsory purchase, that quasi-contract should, at least at the option of the landowner, be at "an end. This was the opinion of Lord Romilly in *Richmond* v. "*North London Railway Co.*,[24] and though on appeal Lord Cairns "did not think it necessary to decide this, he did not, I think, "express dissent from it." Applying those principles to the present case, I have to consider what powers were granted to the promoters by their special Act, and that, of course, depends on the true construction of the Dudley Hall Street (Compulsory Purchase) Order, 1937, and, in particular, paragraph 1.

Mr. Cross submitted that the powers conferred in relation to the properties described in Part I of the Schedule to the Order were wide and could be exercised quite generally in relation to the improvement of Hall Street regardless of the provisions of Part II of the Schedule. I am not satisfied that that is correct. This was one scheme for the development of a whole site, and it seems to me that it must be looked upon as a whole. At every stage the proposals referred to a deposited plan, the first edition of which the Minister refused to sign as it did not expressly refer to the proposal to provide a market hall. It is not, however, necessary for me to decide finally that point. I think this matter can be decided on a rather broader basis. The fact remains—and the evidence seems to me to be quite clear and is admitted—that no one now has any idea or proposal to erect a market hall and no one now is proposing to widen Hall Street. It seems to me that the original scheme is dead and the proposals now are quite different. There is going to be a large car park. I do not know what would have been said by the Minister of Transport had he been asked to sanction a car park in 1937. It seems to me that, looking at all the circumstances of this case, the promoters have abandoned the order; they simply are not proposing to carry it out. That is reinforced by the negotiations which started in 1951 when the corporation endeavoured to acquire, by agreement, the rear portion only of the plaintiffs' property. Accordingly, it seems to me, on the facts, that this order has been abandoned.

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[24] L.R. 5 Eq. 352.

If it cannot be put as high as this, what are the corporation doing? They seem to me to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorized to exercise compulsory powers by the compulsory purchase order. What that purpose is is not yet finally established. A number of different plans have been put before the corporation. We do not know what they are going to do with the island site. If that is the true state of affairs—and I venture to think it must be—then, surely, they cannot, consistently with the principles I have enunciated, compel an owner to submit to a notice to treat issued under a compulsory purchase order, conferring powers for certain specific and detailed matters set out in the order. They are really—and the town clerk was candid about it—endeavouring to acquire these properties in order that they may have an opportunity for general re-development. That shows they are going entirely outside the order and, if that be so, then they must be restrained from doing so.

I do not have to consider the mere effect of delay. Had the case been that when the limited loan sanction was permitted in 1955 the corporation were proposing to go on with their 1937 compulsory purchase order, different considerations might have applied. Whether the corporation would now be entitled to go on with it I do not decide, because the evidence is all one way that they are not now proposing to go on with it. If I am wrong on the facts, and the corporation have not abandoned the order of 1937, technically, I suppose, they could revert to it; it would, in my view, be most inequitable, after this long delay, to allow them any further time in which to retrace their steps, even should they desire to do so.

I want to make it plain that the bona fides of the corporation are not in doubt. No criticism can be directed against them because they are taking a long time considering what is the best development for an important site in the heart of the borough. I do, however, criticize them for trying to acquire, under powers which, in my judgment, are now dead or, at all events, unenforceable, property at pre-war prices. They should either try to acquire the property by agreement or under some new scheme, under some new statutory provision, the Public Works Facilities Act having been repealed in 1946.

Accordingly, on those various grounds, it seems to me that the corporation can no longer be permitted to treat the notice to treat as being valid or operative. I propose to make a declaration that the notice to treat is no longer of validity or legal effect, and I shall declare that the defendants have no powers under, or by virtue of, the compulsory purchase order to acquire the plaintiffs' premises or any part thereof.

Declaration accordingly.

Solicitors: *Stafford Clark & Co. for William Wright & Son, Dudley; Lees & Co. for P. D. Wadsworth, Dudley.*

P. P.

CARSON (INSPECTOR OF TAXES) *v.* CHEYNEY'S EXECUTOR.

1957
June 3, 4, 6.

Harman J.

C. A.

1957
Oct. 2, 3, 21.

Jenkins, Parker and Pearce L.JJ.

Revenue—Income tax—Discontinuance of trade or profession—Author—Death—Royalties—Royalties paid after author's death arising from contracts made by him—Whether assessable to income tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, III, VI.*

On June 26, 1951, C., an author, died. Certain sums were paid to the executor after C.'s death as royalties under agreements entered into by C. There were four representative examples of these agreements, three dealing with works which at the dates of the agreements were not yet written and in which, therefore, there was not copyright or property, and the fourth with the publication in French of an extant work already the subject of copyright. During his life C. had been assessed—properly, as the Crown admitted—in respect of royalties received under the agreements as profits arising from the carrying on of his profession as an author under Case II of Schedule D.

Harman J., affirming the commissioners, held that the sums were rewards for professional services rendered by C. and that his death did not alter their nature so as to make them taxable under Case III or Case VI of Schedule D to the Income Tax Act, 1918.

On appeal by the Crown:—

Held, dismissing the appeal, that the case was indistinguishable from *Stainer's Executors* v. *Purchase* (infra) notwithstanding that the sums in question in the present case were more aptly described as the reward for professional activities than remuneration for professional services, since the principle stated in *Bennett* v. *Ogston* (infra) applies to professional activities whether or not they consist of the rendering of services; and notwithstanding that the sums in question were obtained by licensing the copyright in the works to publishers, since the copyright was brought into existence by the professional activity in the writing of books and nothing else.

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CARSON (INSPECTOR OF TAXES) *v.* CHEYNEY'S EXECUTOR.

Stainer's Executors v. *Purchase* [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367 applied.

Bennett v. *Ogston* (1930) 15 T.C. 374 distinguished.

Decision of Harman J. affirmed.

APPEAL from the Commissioners for the General Purposes of the Income Tax for Bromley, Kent.

The appeal was by the Crown against a decision that large sums received in the income tax years 1951–1952 and 1952–1953 by the executor of Peter Cheyney, the author, after Peter Cheyney's death, representing periodical payments arising out of contracts made by Peter Cheyney during his lifetime in the course of his profession as an author, were exempt from charge to tax.

The case stated provided:

1. At a meeting of the commissioners held on March 29, 1956, William Alexander Roy Collins, the sole surviving executor of the will of Reginald Evelyn Peter Southouse Cheyney, deceased (hereinafter called the "executor") appealed against assessment to income tax made upon him under Schedule D [1] of the Income Tax Acts, 1918 and 1952, for the years 1951–1952 and 1952–1953 the first and additional assessments totalling £10,000 for the year 1951–1952 and £18,000 for the year 1952–1953. The question for our determination was whether certain sums paid to the executor after the death of Reginald Evelyn Peter Southouse Cheyney as royalties under agreements entered into by him as hereinafter mentioned were assessable to tax under Cases III or VI of Schedule D.

2. The following facts were admitted or proved:

(a) Reginald Evelyn Peter Southouse Cheyney (hereinafter called "Peter Cheyney") was a well-known writer of detective fiction who died on June 26, 1951.

(b) During his lifetime Peter Cheyney had entered into some 50 or 60 agreements with publishers to write books or for the publication of books already written. Four only of such agreements were put in evidence and it was agreed between the parties that the decision of the court as regards sums paid under those

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[1] Income Tax Act, 1918, Sch. D: "2. Tax under this Schedule shall be "charged under the following cases "respectively; that is to say . . . "Case II—Tax in respect of any pro-"fession, employment or vocation not "contained in any other Schedule; "Case III—Tax in respect of profits "of an uncertain value and of other "income described in the rules applic-"able to this Case . . . Case VI—"Tax in respect of any annual profits "or gains not falling under any of "the foregoing Cases, and not "charged by virtue of any other "Schedule."

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four agreements should apply to moneys paid under all other agreements unless the court should distinguish one of those four agreements from another. All the agreements made by the deceased from which royalties arose could, as regards form, be classified into one of the categories of which these four agreements are representative. There were also produced to the commissioners lists of the titles of books to which the representative royalty agreements referred and of the amounts received.

(c) Peter Cheyney during his lifetime was assessed under Case II of Schedule D in respect of the royalties he received from his sale agreements as being profits arising from the carrying on of his profession as an author after deducting therefrom all proper and allowable expenses of carrying on such profession, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability, the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers.

(d) The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers subsequently to Peter Cheyney's death. In respect of sums received under contracts made by the executor the executor admitted his liability to tax under Schedule D, without prejudice to the alternative contention (a) contained in paragraph 3 below advanced on his behalf.

(e) The executor's actual receipts were as follows:—

	1951–1952	1952–1953
Under contracts made by Peter Cheyney	11,725 19 10	12,026 0 5
Under contracts made by the executor	598 13 0	2,195 15 1
	£12,324 12 10	£14,221 15 6

3. It was contended on behalf of the executor that the sums received by him after Peter Cheyney's death arising from contracts made personally by Peter Cheyney were remuneration earned by Peter Cheyney during his lifetime in following his profession and that as his profession had ceased on his death such payments could not be taxable as annual payments under Case III or as annual profits or gains under Case VI of Schedule D.

In the alternative it was contended on behalf of the executor:—(a) that if the royalties were annual payments falling within Case III of Schedule D then in so far as they were payable wholly out of profits or gains brought into charge to tax no assessment could be made upon the executor; (b) that if the royalties were annual profits or gains falling within Case VI of Schedule D they must be considered as accruing from day to day and be computed so far as concerned the year 1951–1952 by excluding such portions of the royalties as had accrued to the date of Peter Cheyney's death.

4. It was contended on behalf of the Inspector of Taxes that the sums in question received by the executor which arose from agreements entered into by Peter Cheyney were annual payments assessable under Case III of Schedule D or in the alternative that these sums were assessable under Case VI of Schedule D.

5. The following cases were referred to: *Stainer's Executors* v. *Purchase* [2]; *Bennett* v. *Ogston.*[3]

The commissioners who heard the appeal adjourned the case for consideration and on April 9, 1956, gave their decision as follows:—

"This is an appeal brought by the executor of R. E. P. S. "Cheyney who died on June 26, 1951, concerning assessments "raised against him under Schedule D, Case VI, on certain "royalties received by him after the date of death. The assess- "ments totalled £10,000 for the year 1951–1952 and £18,000 for "the year 1952–1953.

"The deceased was an author who in the course of his "profession had entered into some 50 or 60 contracts with pub- "lishers to write books and the royalties were received by the "executor as a result of those contracts. It was agreed that "four only of such contracts should be used in evidence. The "actual sums were £11,725 19s. 10d. for the year 1951–1952 "and £18,000 for the year 1952–1953.

"There is no dispute between the Inland Revenue and the "executor about the facts of this appeal or as to the sums "mentioned above and no witnesses have been called to give "evidence.

"It is the appellant's case that these royalties are not subject "to tax because they were solely remuneration earned by the "deceased in his lifetime in following his profession as an author

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[2] [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071.

[3] (1930) 15 T.C. 374.

"and that, his profession having come to an end with his death, "they cease to be taxable under Case II or any other Case of "Schedule D. The appellant relied entirely on the case of "*Stainer's Executors* v. *Purchase*,[4] reported as *Gospel* v. "*Purchase*.

"For the Crown it was contended that there was a difference "between that case and the case now under appeal and that a "distinction could be drawn although there was a surprising "similarity of facts. We were told that if the appellants were "right they would have created a fount of untaxed income for a "period of 50 years after the deceased's death. It was also "argued that an author is not paid for writing but for pro-"ducing an asset in the form of a copyright which is exploited "by agreements producing royalties.

"We were referred to *Bennett* v. *Ogston*[5] which concerned "assessments to tax on the interest carried by certain promissory "notes taken by a moneylender in the course of his business, "the interest being subsequently received by his executors. The "Crown invited us to say that a parallel could be drawn in this "case; that, just as the promissory notes continued to produce "interest or income, so do the copyrights created by an author "and that the copyrights themselves were income-bearing assets. "In view of the decision in *Stainer's* case,[6] the Crown were "(sic) unable to argue that the deceased's contracts were them-"selves income-bearing assets. If we accept the Crown's con-"tention, then the royalties would fall to be taxed under Case "III or VI as being receipts arising from a different source from "those under Case II.

"In our opinion Peter Cheyney derived his remuneration "during his lifetime from his professional activities as an author "in writing books whether pursuant to agreements or otherwise. "When he wrote them, either before or after entering into con-"tracts, he created copyrights. It is our view that copyright, "whether in the manuscript of a book or a piece of music, has "only a potential value in producing capital money or income, "according to how and when or maybe where it is used or "exploited. Some further act is necessary, apart from writing "the words or music, in order to procure some monetary reward "for the work. In the words of Lord Asquith in *Stainer's* "case,[6] it does not by its independent vitality generate income. "It does not, therefore, in our view, fall within this definition

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[4] [1952] A.C. 280.

[5] 15 T.C. 374.

[6] [1952] A.C. 280.

" and become an income-bearing asset, any more than does the " contract which may have brought the writing and thus the " copyright into existence.

" We have decided that these sums were, as in *Stainer's* " case,[6] the rewards for professional services rendered or carried " out by the deceased in his lifetime, and his death did not alter " or change the nature or the character of the payments so as " to make them taxable under Case III or Case VI.

" The appeal will therefore be allowed and the assessments " made upon the executor in respect of each of the two years " under appeal will be discharged so far as those assessments " relate to royalties from contracts entered into by the deceased.

" We left the figures of the assessments in respect of royalties " from contracts made by the executor to be agreed between the " parties.

" 8. On May 31, 1956, when the appeal came before us for " final determination we discharged the assessments for the two " years under appeal so far as those assessments related to royalties received by the executor from contracts made by Peter " Cheyney and so far as they related to royalties from contracts " made by the executor we determined the assessments at £598 " for the year 1951–1952 and £2,195 for the year 1952–1953.

" 9. The appellant immediately after the determination of " the appeal declared to us his dissatisfaction therewith as being " erroneous in point of law and in due course required us to " state a case for the opinion of the High Court pursuant to " section 64 of the Income Tax Act, 1952, which case we have " stated and do sign accordingly.

" The question of law for the opinion of the court is whether " our decision as set out in the last two preceding paragraphs is " erroneous in point of law."

Annexed to the case stated were four representative contracts, all made by Peter Cheyney and all producing money during the years in question. The first three contracts dealt with works which were yet to be written and in which, therefore, no copyright or property could exist at the dates of those contracts. The fourth provided for the exploitation in French of a work which, at the date of the contract, was already in existence and was itself the subject-matter of copyright.

H. B. Magnus Q.C., *Sir Reginald Hills* and *Alan Orr* for the Crown. This case is covered, not by *Stainer's Executors* v.

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[6] [1952] A.C. 280.

Purchase,[7] but by *Bennett* v. *Ogston*.[8] In the latter case the executors of a moneylender on whose outstanding promissory notes the debtors were paying interest were held liable to pay tax under Case III, notwithstanding that while the moneylender was alive interest on the notes had been taxed, as being profits of his trade, under Case I. Just as those debts, which became payable to him as a result of his trade activity of moneylending, were still taxable after his death, so in the same way are these royalties of Peter Cheyney which he gained by the professional activity of writing and which are therefore taxable under Case VI. In the one case the promissory notes and in the other the author's copyrights continued to produce interest or income. Thus, the sums in question, received by the executor during the income tax years 1951–1952 and 1952–1953 are not exempt from charge to tax and, accordingly, this appeal should be allowed.

B. L. Bathurst Q.C. and *C. N. Beattie* for the executor. This case is indistinguishable from *Stainer's Executors* v. *Purchase*.[9] In that case Leslie Howard had done all the acting required of him and had completely fulfilled all his contracts and money was still being made, after his death, out of the showing of the films; and the House of Lords held that the payments made after his death were not subject to tax, because they were simply the residual receipts of his professional activities. [*Bennett* v. *Ogston* [10] was referred to.] In *Stainer's Executors* v. *Purchase* [11] the film, not the acting, was exploitable and exploited; in the present case the copyright, not the royalties. Both in that case and in the present case money received under the agreements was taxable as professional remuneration under Case II. In *Stainer's Executors* v. *Purchase* [11] it was because the payments were professional remuneration that they were taxable only under Case II. At death taxation came to an end, since there could not be any further professional activity, so that the Crown had already got all the tax that it could and could not proceed to get more by taxing the same payments again under Case III or Case VI. Likewise in the present case, while Cheyney was alive the royalties could not be taxed under Case III or Case VI, because he could deduct his professional expenses before paying any income tax at all, so that the royalties were not pure income profit. [*Asher's* case [12] was referred to.] In accordance with *Stainer's Executors* v. *Purchase*,[13] the royalties in the present case, which would have been taxable under Case II during Cheyney's lifetime, do not become taxable under Case III after his death. Accordingly, the finding of the commissioners was correct and the appeal should be dismissed.

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[7] [1952] A.C. 280.

[8] 15 T.C. 374.

[9] [1952] A.C. 280.

[10] 15 T.C. 374.

[11] [1952] A.C. 280.

[12] [1944] K.B. 133; 60 T.L.R. 115; [1944] 1 All E.R. 77.

Cur. adv. vult.

June 6, 1957. HARMAN J. read the following judgment. This is an appeal by the Crown from a decision of the General Commissioners of Income Tax in favour of the executor of the late Peter Cheyney arising out of receipts by him of large sums in the income tax years 1951–1952 and 1952–1953 representing periodical payments arising out of contracts made by Mr. Cheyney during his lifetime in the course of carrying on his profession as an author. The point may be shortly stated, though none the easier for that. It is whether these payments are to be regarded as remuneration for personal services or professional activities of the deceased received after the cesser of the professional activity, or whether they should be regarded as moneys arising from the exploitation of the author's property, namely, the copyrights in sundry of his books.

The facts are stated in the case, to which are annexed four representative contracts, agreed to illustrate all the contracts made by the author producing money in the years in question. There is, as it seems to me, a considerable difference between the first three agreements and the fourth, for the first three deal with works to be written and in which, therefore, no copyright or property could exist when the agreements were made, whereas the fourth agreement deals with the exploitation in the French language of an existing work being itself the subject-matter of copyright, though the proposed translation would, when made, have copyright of its own.

It is the contention of the taxpayer that the decision of the House of Lords in *Stainer's Executors* v. *Purchase*,[1] which is, of course, binding upon me, is indistinguishable from the present case. That case concerns receipts by his executors arising out of the professional activities of a film actor known as Leslie Howard, and certainly bears a strong resemblance to the present case. The actor there agreed to perform in and to produce certain film stories in consideration of remuneration which in part was dependent upon the success of the films and the profits which might be derived from their exploitation. It was, as the House of Lords held, an agreement for personal services, the written contracts simply providing the machinery by which the services were to be remunerated. When the actor died, the results of his professional activities were still in the course of being exploited. He had done everything which the contracts demanded of him, and the payments after his death were, as the House of Lords held, merely residual receipts arising out of his professional activities, and as such not the subject-matter of taxation. This principle is well stated by Rowlatt J. in *Bennett* v. *Ogston*,[2] and as this is a classic statement on the subject I think I should read it again: "When a trader or "a follower of a profession or vocation dies or goes out of "business . . . and there remain to be collected sums owing for "goods supplied during the existence of the business or for "services rendered by the professional man during the course "of his life or his business, there is no question of assessing "those receipts to income tax; they are the receipts of the "business while it lasted, they are arrears of that business, they "represent money which was earned during the life of the "business and are taken to be covered by the assessment made "during the life of the business, whether that assessment was "made on the basis of bookings or on the basis of receipts."

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[13] [1952] A.C. 280.

[1] Ibid.

The subject-matter of each of the agreements in *Stainer's* case[3] was a film to be brought into existence. This it was which could be exploited and produce income and not the mere posturings of the actor. Nevertheless the House of Lords held that the payments were not payments arising from the exploitation of the film, but payments for the services of the actor. So here it is said that in the first three cases anyhow the author agrees to bring into existence a book or books and to give the right of publishing to the publisher, being remunerated on a royalty basis, and that the royalties are payments for the services rendered by the author in writing the book and are not to be treated as the income of the property, namely, the copyright.

Again, it is agreed that during the professional life of the actor in *Stainer's* case[3] and during the professional life of the author in the present case the receipts from agreements of this sort were part of professional remuneration and were taxable under Case II of Schedule D accordingly. The House of Lords held in *Stainer's* case[3] that the payments were mere professional

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[2] (1930) 15 T.C. 374, 378.

[3] [1952] A.C. 280.

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Harman J.

remuneration and therefore could not be taxed under any but Case II, and as it was admitted that taxation under that Case must cease when death caused the end of the professional activity it followed that the Crown had exacted all the tax exigible and could not tax the same subject-matter again by having recourse to Case III or Case VI. The same is said to be true here. These royalties were not taxable under Case III or Case VI during the author's lifetime because they were not what Lord Greene M.R. in *Asher's* case[4] styled "pure income profit": in other words, the expenses of carrying on the profession could be deducted before paying the tax. It is argued that the same subject-matter, namely, payments under these contracts which would have been taxable under Case II had the author lived, cannot change their nature and become taxable under Case III because he is dead.

The Crown on its side seeks to distinguish *Stainer's* case[5] and relies on *Bennett* v. *Ogston.*[6] That was a case of a moneylender who when he died had outstanding promissory notes on which the debtors continued to pay interest, and it was held that his executors were liable to pay tax under Case III although in his lifetime the interest on the notes had been taxed under Case I as part of the profits of the moneylender's trade. Now, if this be right, and in spite of hesitation expressed by Lord Simonds in *Stainer's* case[7] I do not feel at liberty to say that it is not, it seems to show that at least one class of payment, namely, "interest of money," may be taxable under Case III after the trading activity has ceased though taxed under Case I while a trade was in progress. It was easy to see in that case that debts outstanding at the moneylender's death earning interest by virtue of the promissory notes continued to be a taxable subject-matter. So, says the Crown, royalties outstanding at the death may be taxed under Case VI. The former is the result of a trade activity, namely, moneylending, and the latter the result of a professional activity, namely, the writing of books. The distinction seems to me to be an extremely fine one, and to be well expressed by Jenkins L.J. in *Stainer's* case[8] in these words, after discussing *Bennett* v. *Ogston*[9]: "Applying these "principles to the present case, I ask myself whether under each "of the contracts A, B and C Mr. Howard is to be regarded

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[4] [1944] K.B. 133.
[5] [1952] A.C. 280.
[6] 15 T.C. 374.
[7] [1952] A.C. 280, 288.
[8] 32 T.C. 367, 404.
[9] 15 T.C. 374.

"as having rendered his professional services for remuneration "consisting of a lump sum or lump sums, plus the notional "capital equivalent of a new source of income in the shape of "the right to receive the shares of receipts or profits, or simply "as having rendered those services for remuneration consisting "of a lump sum or lump sums plus a further sum consisting of "the share of receipts or profits, whatever it might amount to."

So far as the classes represented by the first three contracts here are concerned, I feel that the royalty payments ought to be regarded as professional remuneration to the author for his services to be rendered in writing the book contracted for. In these cases there was nothing in the nature of copyright in existence to be exploited like the money in the moneylender's case, and I think they fall within the second category specified by the Lord Justice. I feel much more doubt about the fourth case because there was already at the date of the contract a subject-matter, namely, copyright, in existence which it may be said that the owner was exploiting. In other words, this was not a contract for services to be rendered, but a contract to receive payments for a licence to be given. On the whole, however, I feel that the distinction is too fine and that all the contracts should be looked at as part of the professional activities of the author. These should be taxed year by year, and if the Crown did not take these potential receipts into account while the professional activities were continuing, it must be taken to have exacted all the tax exigible and cannot by appealing to another Case exact further tax for the same activity. It is to be observed that in at least one of the instances in *Stainer's* case [10] the scenario of the film (in itself the subject-matter of copyright) was in existence and was the actor's property, but this was held to make no difference.

I think I ought, before concluding, to read the speech of Lord Asquith in *Stainer's* case.[11] His Lordship said this: "It "seems clear that the payments whose liability to tax is in "issue were exclusively the fruit or aftermath of the professional "activities of Mr. Leslie Howard during his lifetime. This was, "as a matter of historical fact, their source, and their only "source. The fact that he died before some of this fruit had "been garnered or its amount could be ascertained cannot alter "that historical fact. He, and he alone, had done everything "necessary to provide the harvest." He then cites the passage

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[10] [1952] A.C. 280, 290.

[11] Ibid.

I have already read in *Bennett* v. *Ogston*,[12] and continues: "It is, however, contended by the Crown that in *Bennett* v. "*Ogston*[12] the reason why the principle involving exemption did "not apply was that when the moneylender died there was "outstanding an income-bearing asset (namely, that part of the "principal which was then unrepaid) which continued to earn "income, as it were, in its own right. It was argued for the "Crown that the same was the case here, the income-bearing "asset consisting of the contracts made by Mr. Leslie Howard "whereunder the payments in question were posthumously made. "There seems to me, however, to be a very clear distinction "between 'income-bearing assets' for the purpose of this type "of case and the contracts in question. If Mr. Leslie Howard "had stipulated the payment in blocks of shares or bonds, or "any other instruments which by their independent vitality "generate income, the dividends or interest might well have "been taxable in the hands of his executors. The contracts in "the present case enjoy, in my view, no such independent "vitality. The consideration for what Mr. Howard was to do— "to act or manage—was not the grant of a contract or contracts "but the payment of money under the terms of those contracts. "Mr. Howard acted for money; he did not act for contracts. "The contracts were mere incidental machinery regulating the "measure of the services to be rendered by him on the one "hand and, on the other, that of the payments to be made "by his employers; they were not the source, but the instrument "of payment, and his death, in my view, did nothing to divest "them of that character."

Every word of that could serve for a description of the present case, and I think I am bound by it to hold that the conclusion I ought to reach must be the same and to dismiss this appeal, which I do.

Appeal dismissed.

K. R. A. H.

The Crown appealed.

H. B. Magnus Q.C. and *Alan Orr* for the Crown. The executor appealed against the assessments on the ground that royalties which come in after the author's death under contracts entered into by him in his lifetime still wear in the executor's hands the quality of professional receipts earned by him in his lifetime in the course of exercising his profession: that carries with it the necessary corollary that such royalties cannot be charged to tax in their own right after the source has disappeared, namely, after death. That contention was accepted both by the commissioners and by Harman J. The Crown contend that all royalties which come in after death are a substantive subject-matter of taxation in the executor's hands under Schedule D, taxable income in their own right, copyright royalties being within the Schedule D charge by virtue of the machinery provisions providing for the assessment of both patent and copyright royalties: sections 170 and 470 of the Income Tax Act, 1952.

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[12] 15 T.C. 374.

Harman J. based his decision on that of the House of Lords in *Stainer's Executors* v. *Purchase*,[1] the deceased Stainer there being the well-known actor Leslie Howard. In that case the House of Lords approved the dissenting judgment of Jenkins L.J. in the Court of Appeal [2] in favour of the executors. An analysis of the decision in that case shows, however, that it is distinguishable. It is fundamental to that decision that the courts were there dealing with a pure contract for professional services—a contract or series of contracts which did nothing save define, on the one hand, the professional services to be rendered and, on the other, the remuneration for those services. That case was not concerned with any right of property but solely with contracts for the rendering of professional services. The lump sums in question were remuneration earned by Leslie Howard in his lifetime by rendering the services stipulated in the contracts, and, accordingly, the payments received by his executors still constituted remuneration earned by Howard in his lifetime and were covered by the assessment then made.

In the present case, however, Peter Cheyney never entered into any agreement under the terms of which he was paid for rendering professional services. In particular, he was never paid for writing books. The royalties which he received, on the true construction of the agreements and in the light of the relevant statutory provisions dealing with copyright, are to be regarded as attributable simply and solely to the grant by him to his publishers of a right to publish his books—a right of property. When an author writes a work he brings into existence an asset whose income-bearing product may last long after he has discontinued the profession or vocation of an author. The publishers cannot be taken to have been paying Cheyney for writing the books in question, since what a publisher wants is the *right* to publish, and, accordingly, he requires the copyright in them. These agreements are grants of copyright in return for the payment of royalties.

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[1] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

[2] 32 T.C. 367, 396.

In some respects the present case is the converse of *Stainer's Executors* v. *Purchase*,[3] and is more akin to *Bennett* v. *Ogston*,[4] on which reliance is placed, since, just as the interest on the debts outstanding at the moneylender's death by virtue of the promissory notes continued to be subject to tax, so royalties outstanding at the death are assessable under Case VI. The former is the result of a trade activity, namely, moneylending, and the latter the result of a professional activity, namely, the writing of books. But it is emphasized that the payments in question in the present case did not arise as the result of goods supplied or services rendered by the deceased in his lifetime, and, accordingly, they are not within the exemptions noted by Rowlatt J. Further, it does not follow that because the royalty payments were not treated as pure income payments during Cheyney's lifetime, but were correctly treated for the purposes of Case II of Schedule D as merging in the general fund of his professional receipts, that, therefore, royalties received by his executor fall to be treated as professional receipts after his death and thereby covered by assessments already made. [Reference was also made to sections 1, 2, 3 and 5 of the Copyright Act, 1911, and to *Billam* v. *Griffith* [5] and *Curtis Brown Ltd.* v. *Jarvis*.[6]]

B. L. Bathurst Q.C. and *C. N. Beattie* for the executor. This case is completely covered by *Stainer's Executors* v. *Purchase*,[7] as a comparison of the facts in the two cases will show. Cheyney was a writer of stories; Leslie Howard was a film actor and producer. All Howard's performances were recorded on cinematograph film; Cheyney's stories were recorded in books. Neither Cheyney's stories nor Howard's acting had any value unless and until they were exploited. Both Cheyney and Howard in their lifetime were assessed under Case II of Schedule D. In both these cases the exploitation took fundamentally the same form. They entered into contracts which provided for the payment of a percentage of takings derived, in the case of Cheyney, from the sale of books, and, in the case of Howard, from the showing of films.

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[3] [1952] A.C. 280.
[4] (1930) 15 T.C. 374, 378, 379.
[5] (1941) 23 T.C. 757, 761, 762.
[6] (1929) 14 T.C. 744.
[7] [1952] A.C. 280.

The Crown have emphasized the question of copyright, but copyright is really a red herring. Suppose that Cheyney had written his books at a time when there was no such thing. In those circumstances an author could still have contracted to have his works published on a royalty basis. The effect of copyright is merely to increase the value of the thing exploited. It was an important element in the Howard contracts. The film companies acquired the copyright of the films, and that was, in a sense, what was exploited when they showed the films. The only value of copyright in these matters is the value of what the professional man, be he author or actor, has to offer. In the present case the copyright remained in Cheyney. The agreements were licences. They were not assignments of copyright, for if they were, they would have contained reverter clauses which would have provided for reassignment: see section 5 (2) of the Copyright Act, 1911.

To succeed, the Crown must show that a change in the nature of the income took place on Cheyney's death. That appears clearly from what Lord Simonds said in *Stainer's Executors* v. *Purchase*.[8] Both Lord Simonds and Lord Asquith said in that case [9] that the contracts were mere machinery for producing the money. Cheyney was writing stories to produce the money. The two cases are entirely on all fours.

Cheyney during his lifetime could not have been assessed under Case III of Schedule D, because once it was established that he was carrying on the vocation of an author, he was entitled to deduct his expenses: see *per* Lord Greene M.R. in *Asher* v. *London Film Productions Ltd.*[10] Further, the Case II assessments made on Cheyney during his lifetime exhausted the whole of his liability to tax under Schedule D: see *per* Jenkins L.J. and Lord Simonds in *Stainer's Executors* v. *Purchase*.[11] The Crown might be right in the present case if Cheyney had purchased some other person's copyright; but in that event Cheyney would have been assessed under Case III or Case VI in his lifetime, and then on his death there would have been no change in the character of the income.

The statement of principle propounded by Rowlatt J. in *Bennett* v. *Ogston* [12] has received universal approval, although the actual decision in that case was doubted in *Stainer's Executors* v. *Purchase*.[13] *Bennett* v. *Ogston*[14] is distinguished, in that a promissory note is an exceptional type of property, but, if necessary, it is submitted that *Bennett* v. *Ogston*[14] was wrongly decided.

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[8] [1952] A.C. 280, 289.

[9] Ibid. 289, 291.

[10] [1944] K.B. 133, 139, 140; 60 T.L.R. 115; [1944] 1 All E.R. 77.

[11] 32 T.C. 367, 404, 405, 411.

[12] 15 T.C. 374.

A minor point arises in connexion with the fourth contract. This was nothing but a licence; in no sense was it a dealing with copyright; if it had been, Cheyney would have been taxed in respect of it under Case III of Schedule D, but this course was not taken by the Revenue. [Reference was also made to Copinger and Skone James on the Law of Copyright, 8th ed., p. 221, and to *Curtis Brown Ltd.* v. *Jarvis*.[15]]

Beattie following. Rowlatt J. in *Bennett* v. *Ogston*[16] said: "When a trader or a follower of a profession or vocation dies or "goes out of business . . . and there remain to be collected sums "owing for goods supplied during the existence of the business "or for services rendered by the professional man during the "course of his life or his business, there is no question of assessing "those receipts to income tax; . . ." The Crown here fastened on those words and contended that if Cheyney was not being paid for goods supplied or for services rendered, the present case does not come within that principle. But the principle is not confined to those two classes of category. It applies to all professional receipts, and therefore it is applicable in the present case. It is irrelevant to consider whether the payments made to Cheyney were in consideration of the services he rendered in writing the books or in respect of a licence to the copyright in them. The only question is whether the payments were or were not professional receipts.

Magnus Q.C. in reply. The Crown are not seeking to say that the royalties in question changed their character on Cheyney's death. They were at all times copyright royalties and during his life they merged in his professional receipts. *Stainer's Executors* v. *Purchase*[17] is distinguishable. The contracts in that case were mere machinery to define the services to be rendered on the one hand and the remuneration to be received on the other. To solve the present problem one must anchor one's self to the proposition that copyright is property and royalties are income from property. Income from copyright is chargeable under Case VI of Schedule D.

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[13] [1952] A.C. 280.

[14] 15 T.C. 374.

[15] 14 T.C. 744.

[16] 15 T.C. 374, 378.

[17] [1952] A.C. 280.

[Reference was made to *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[18]]

Rowlatt J.'s general principle is confined to remuneration or receipts derived, in the case of a professional man, from the rendering of services, and, in the case of a trader, from either the rendering of trade services or the supply of goods made or sold.

[PARKER L.J. I do not see why Rowlatt J.'s principle is to be confined to the two cases stated. Why should it be so confined?]

Because the principle of the Income Tax Acts is that if a professional man or trader is being taxed on the profits of his profession or trade, then in principle anything done or any goods sold ought to come into the receipts of the particular year in which they were rendered, sold or supplied. The Leslie Howard case [19] turns on the fact that the services on which he was engaged were completely performed before his death and therefore the contracts in that case did not constitute a source of income on property. But Cheyney was not paid for writing, although his activity was writing; that activity produced an asset for him, a right of property; and his remuneration was derived from dealing with that right.

The condition precedent to Rowlatt J.'s principle being applied is that the money which comes in has been earned during the lifetime of the profession, and that there is no right or piece of property which has been put out to use which could continue to be or has continued to be used after the trade or profession has ceased. Here what is being paid for is copies sold. In the present case the property put out to use, namely, the copyright, is akin to the money lent in *Bennett* v. *Ogston.*[20] [Reference was also made to *Inland Revenue Commissioners* v. *Gardner, Mountain and D'Ambrumenil Ltd.*[21]]

Cur. adv. vult.

October 21. JENKINS L.J. The judgment I am about to read is the judgment of the court.

This is an appeal by the Crown from a judgment of Harman J. dated June 6, 1957, affirming a decision of the General Commissioners of Income Tax for the division of Bromley, Kent, in favour of the taxpayer, who had appealed against assessments to income tax, Schedule D, for the years

[18] [1913] A.C. 610; 29 T.L.R. 757; 6 T.C. 327.

[19] [1952] A.C. 280.

[20] 15 T.C. 374.

[21] (1947) 29 T.C. 69, 90, 92 (H.L.); sub nom. *Gardner, Mountain and D'Ambrumenil* v. *Inland Revenue Commissioners* [1947] 1 All E.R. 650.

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1951–1952 and 1952–1953 made upon him as sole surviving executor of the will of the late Peter Cheyney, a well-known author of detective fiction, in respect of royalties received by the taxpayer after Cheyney's death under contracts with publishers made in his lifetime.

Peter Cheyney died on June 26, 1951. It is common ground that down to the date of his death he had been carrying on the profession of an author, and accordingly that, during his lifetime, the royalties received by him under his contracts with the various publishers of his works were properly assessable, under Case II of Schedule D, as profits of his profession, and not as annual payments under Case III or as "annual profits or gains not "falling under any other case and not charged by virtue of any "other Schedule" under Case VI. During the continuance of the profession Case VI was by definition excluded because the royalties fell under Case II, and Case III had no application because Case II applied and, accordingly, the proper subject of tax was not simply the amount of the royalties received under each of the various contracts considered individually, but consisted of the balance of profit arising from the totality of Cheyney's professional activities, arrived at by deducting from the aggregate of his professional receipts the aggregate of the outgoings properly allowable as expenses of his profession. See *Davies* v. *Braithwaite.*[1] See also *Asher* v. *London Film Productions Ltd.*,[2] where Lord Greene M.R. distinguishes annual payments constituting "pure income profit," and as such payable under Case III, from payments which are merely an element in the computation of profits and accordingly are not so taxable.

This having admittedly been the position as regards royalties received in Cheyney's lifetime, the question in the case is whether (as is contended on the part of the Crown) the discontinuance of Cheyney's profession by reason of his death had the effect of changing the character of the royalties thereafter received from that of profits or gains of Cheyney's profession to that of annual payments taxable under Case III or, alternatively, of annual profits or gains taxable under Case VI.

This very question was, on closely comparable facts, decided against the Crown by the House of Lords in *Stainer's Executors* v. *Purchase.*[3] The commissioners and the judge regarded the present case as concluded against the Crown by that authority, which is, of course, binding upon us as it was upon them.

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[1] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[2] [1944] K.B. 133, 140; 60 T.L.R. 115; [1944] 1 All E.R. 77.

[3] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

Mr. Magnus, on behalf of the Crown, sought to persuade us that this case was distinguishable on its facts from *Stainer's Executors* v. *Purchase*,[4] and that we were free to decide it, and ought on the merits to decide it, the other way. We are not so persuaded.

In order to do justice to Mr. Magnus's submission it will be necessary to make a comparison between the facts of the two cases, but before doing so we should refer to a passage, quoted in both of them, from the judgment of Rowlatt J. in *Bennett* v. *Ogston*,[5] which was accepted by the House of Lords in *Stainer's Executors* v. *Purchase* [6] as embodying a correct statement of the relevant principle of income tax law (see *per* Lord Simonds L.C.,[7] and *per* Lord Asquith of Bishopstone [8]). In *Bennett* v. *Ogston* Rowlatt J. said [9]: "When a trader or a follower of a profession "or vocation dies or goes out of business—because Mr. Needham "is quite right in saying the same observations apply here—and "there remain to be collected sums owing for goods supplied "during the existence of the business or for services rendered by "the professional man during the course of his life or his "business, there is no question of assessing those receipts to "income tax; they are the receipts of the business while it "lasted, they are arrears of that business, they represent money "which was earned during the life of the business and are taken "to be covered by the assessment made during the life of the "business, whether that assessment was made on the basis of "bookings or on the basis of receipts."

We should add that the particular case before Rowlatt J. was concerned with the question whether the interest element in instalments on promissory notes falling due after the death of a deceased moneylender and collected by his executors was taxable in their hands as "interest of money" under Case III of Schedule D or was simply a deferred receipt of the discontinued business and as such not taxable under the Case; and that, after stating the principle to be applied in the passage quoted above, he went on to decide that question in favour of the Crown in the following words [10]: "But this is not that case; because here the "interest in question is not the accrued earnings of the capital

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[4] [1952] A.C. 280.
[5] (1930) 15 T.C. 374.
[6] [1952] A.C. 280.
[7] Ibid. 288.
[8] Ibid. 290.
[9] 15 T.C. 374, 378.
[10] Ibid.

"during the life of the deceased or the time the business was "carried on; it is the earnings of the capital, or so much as is "left of it since the death, and this interest has been earned "over the time which has elapsed since the death." And on the next page he said [11]: "I think when you are dealing with what "is interest and nothing but interest you cannot say it is in the "nature of business, because it is payment by time for the use of "money."

While accepting as correct Rowlatt J.'s statement of the principle to be applied, Lord Simonds in *Stainer's Executors* v. *Purchase* [12] expressed a doubt, which he found it unnecessary to decide, on the question whether the judge correctly applied the principle in the case before him.

But so far as the principle itself is concerned, *Stainer's Executors* v. *Purchase* [13] must be taken as establishing the general proposition that where after the discontinuance of a business or profession sums are received which represent money earned during the life of the business or profession, they are not assessable to tax but are taken to be covered by the assessment made "during the life of" (that we take to mean "down to the date "of discontinuance of") "the business." Moreover, in view of the nature of the receipts with which *Stainer's Executors* v. *Purchase* [14] was concerned, that case must further be regarded as establishing that this general proposition is not displaced by the circumstances that the receipts in question are periodical payments in the nature of royalties or shares of profits which are not payable or quantified or capable of quantification until after the date of discontinuance. After referring to *Bennett* v. *Ogston*,[15] Lord Simonds L.C. said [16]: "If so" (that is to say, if Rowlatt J. had correctly stated the relevant principle) "there seems to me to "be an end of the case. How else could these sums come to the "hands of Mr. Howard or his executors than as the remuneration "for his professional activities, the reward for services rendered "by him during his life and unpaid for at his death? It appears "to me wholly irrelevant that they were not payable until after "his death and equally so that they were not and could not be "quantified until after that event. They retained the essential "quality of being the fruit of his professional activity. If in all "the circumstances it was not possible to bring the sums into "account in the years in which they were earned, as I will

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[11] 15 T.C. 374, 379.

[12] [1952] A.C. 280, 288.

[13] [1952] A.C. 280.

[14] Ibid.

[15] 15 T.C. 374.

[16] [1952] A.C. 280, 288, 289.

"assume to be the case, the result is not to change the character "of the payment but to exhibit that some professional earnings "may escape the income tax net. The withdrawal of the cross-"appeal shows that lump sum payments made in the "circumstances of the present case do so escape." We will return later to Rowlatt J.'s actual decision in *Bennett* v. *Ogston*,[17] on which some reliance was placed by Mr. Magnus.

We now pass to a comparison of the facts of the present case with those of *Stainer's Executors* v. *Purchase*.[18]

As to the latter, Leslie Howard Stainer (better known by his professional name of Leslie Howard) was a distinguished film actor and producer whose profession was discontinued by his death in 1943. Prior to his death he had in the ordinary course of his profession entered into certain contracts with film-producing companies under which he was to render services (in the shape of producing, directing and acting) in specified films for remuneration which included percentages or shares of the profits or receipts to be derived from the exploitation of the films when made. It appears that in one instance Howard was the owner of the story and shooting script of the proposed film, both of which he was to assign to the company, but no part of the payments to be made by the company was expressed to be attributable to this assignment as distinct from the services to be rendered by Howard. In each case the copyright in the film when completed was to belong to the company. Howard in each case duly performed the services contracted for. After his death sums were from time to time received by his executors in respect, inter alia, of the percentage or shares of profits or receipts payable under the contracts in question. It is to be observed: (a) that the contracts gave Howard no proprietary interest in the completed films; (b) that in the one case in which he owned the story and shooting script the contract required him to make it over to the company; (c) that the percentages or shares of profits were in the nature of remuneration for services save in so far as some undefined part of such payments in the case in which he owned the story and shooting script should be held attributable to his assignment of those items to the company; and (d) that the amounts which might from time to time be received by the executors by way of percentages or shares of profits were unpredictable, depending as they did on the popularity of the films and the energy and success with which they might be exploited.

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[17] 15 T.C. 374.

[18] [1952] A.C. 280.

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As to the facts of the present case, we would refer to paragraph 2 of the case stated by the general commissioners, which reads as follows: "The following facts were admitted or proved: "(a) Reginald Evelyn Peter Southouse Cheyney (hereinafter "called Peter Cheyney) was a well-known writer of detective "fiction who died on June 26, 1951. (b) During his lifetime "Peter Cheyney had entered into some 50 or 60 agreements "with publishers to write books or for the publication of books "already written. Four only of such agreements were put in "evidence, and it was agreed between the parties that the "decision of the court as regards sums paid under those four "agreements should apply to moneys paid under all other agree-"ments, unless the court should distinguish one of those four "agreements from another. All the agreements made by the "deceased from which royalties arose could, as regards form, "be classified into one of the categories of which these four "agreements are representative. There were also produced to "the commissioners lists of the titles of books to which the "representative royalty agreements refer and of the amounts "received. These lists are not exhibited but may, if necessary, "be referred to as part of the case. (c) Peter Cheyney during "his lifetime was assessed under Case II of Schedule D in "respect of the royalties he received from his said agreements "as being profits arising from the carrying on of his profession as "an author after deducting therefrom all proper and allowable "expenses of carrying on such profession, and the Crown "admitted that he was properly so assessed. For the purpose "of computing the Case II tax liability, the rule consistently "followed was to credit the copyright royalties as receipts on the "day they fell due for payment under the agreements with the "publishers. (d) The assessments for the two years in question "comprised sums received by the executor from contracts made "by Peter Cheyney and also sums received by the executor "from contracts which he had entered into with the publishers "subsequently to Peter Cheyney's death. In respect of sums "received under contracts made by the executor the executor "admitted his liability to tax under Schedule D. . . ."

We should next refer to the four specimen agreements with publishers exhibited to the case.

The first of the specimen agreements, dated September 9, 1942, and made between Cheyney (therein called "the author") and Faber and Faber Ltd. (therein called "the publishers"), was expressed to relate to a work provisionally entitled "Making

"Crime Pay," which was to be written by Cheyney. By clause 1 the author granted to the publishers "the sole right of "publishing and selling the said work in volume form in the "English language for the period of unrestricted copyright "throughout the world except the United States of America." By clause 2 the author was to deliver to the publishers the manuscript of the said work by January 31, 1943. By clause 3 the publishers agreed to publish the said work within six months of the delivery of the manuscript to them unless prevented by circumstances beyond their control, and reserved to themselves the final decision on all other details of publication and on the issue price of subsequent editions. By clause 4 the publishers agreed during the term of unrestricted copyright to make payments to the author in the shape of royalties consisting of specified percentages of the published price, or in certain circumstances of the amounts received by the publishers, in respect of all copies sold. The author was to receive £250 at the time of publication on account of and in advance of royalties. By clause 5 all details as to the manner of production, publication and advertisement were to be left to the discretion of the publishers, who were to bear all expenses in connexion therewith. Clause 6 contained machinery for the calculation and payment of the sums from time to time due to the author in respect of royalties. Clause 7 gave the author certain rights to receive copies free or at reduced prices. Clause 8 contained a provision for the reverter of all rights in the work to the author if the work should be out of print, and the publishers should not within six months from the receipt of a written notice from the author issue a new edition, or if the publishers should fail to make accountings and payments as therein provided within one month of receipt of written notification of any such default. Clause 9 contained a warranty by the author that the work was not a violation or infringement of any existing copyright or proprietary right at common law and contained nothing obscene, indecent or libellous. Finally, clause 10 related to the correction of proofs by the author.

The second specimen agreement dated September 19, 1950; and made between Cheyney ("the author") and William Collins, Sons & Co. Ltd. ("the publishers") related to five novels to be written by the author, and as in the case of the first specimen agreement the grant of copyright contained in clause 1 was limited to the publication of the five novels in question in volume form throughout the world with the exception of the U.S.A. It contained in clause 4 more elaborate provisions for the payment of royalties by the publishers, which in some instances were to be in the form of percentages of the price of copies sold, and in others in the form of a fixed sum per copy sold, and also a provision for the payment in advance of royalties of the sum of £1,500 on delivery of the manuscript of each novel to the publishers. There was (in clause 10) an express reservation to the author of all dramatic, cinematograph, serial, translation and other rights not specifically granted. There were in clauses 9 and 11 comparable provisions for reverter. Although different in form, we do not think that the second specimen agreement is for the present purpose distinguishable from the first in any material respect.

The third specimen agreement dated March 12, 1946, and made between Cheyney ("the author") and Dodd Mead & Co. Inc. ("the publishers," in this instance an American company) related to four works to be delivered by the author to the publishers which the publishers were to publish within eight months of the delivery of each work. The copyright granted by the author to the publishers (by clause 1) comprised the exclusive right of printing and publishing the works in volume form in the United States of America. As in the other agreements the author was (by clause 6) to be remunerated on a royalty basis dependent on copies sold, with a provision for a specified payment in advance of royalties (clause 7). There were comparable provisions for reverter to the author in certain events (clauses 11 and 12). By clause 14 the proceeds of sale of selection, abridgment, digest and second serial rights were to be equally divided between the author and the publishers, and by clause 15 the right of translation, dramatization and all other rights not specified in the agreement were expressly reserved by the author. Again we do not think there is for the present purpose any material point of distinction between the third agreement and the first, although different in form.

The fourth specimen agreement dated November 4, 1947, was made between Cheyney (therein called "the proprietor") and La Presse de la Cité ("the publishers," in this instance a French firm). The proprietor granted to the publishers the sole licence to translate and publish the work "Making Crime Pay" in volume form in the French language for a payment of 50,000 francs in advance of royalties and a royalty of 12 per cent. on the published price of every copy sold in the French translation up to 5,000 copies, and 15 per cent. on all copies sold thereafter.

The publishers were to bring out their edition of the work within six months of the date of the agreement (clause 4) and (by clause 6) it was provided that the translation of the work should be made faithfully and accurately and that abbreviations or alterations should only be made in the text with the written consent of the proprietor or his agent. There were provisions in clauses 8 and 10 for the termination of the licence in the event of the publishers not issuing their edition within six months, the work going out of print, or the publishers becoming bankrupt or committing any breach of the agreement.

It is to be observed that the first and second specimen agreements related to works to be written by Cheyney. It seems probable that the third also in fact related to works to be written, although it only refers in terms to the delivery of the works in question. On the other hand, the fourth specimen agreement is simply a licence of the French language rights in an existing work.

Laying side by side the facts of *Stainer's Executors* v. *Purchase*[19] and those of the present case we ask ourselves whether such differences as there are between them would suffice to justify this court in reaching a different conclusion here from the conclusion reached by the House of Lords in *Stainer's Executors* v. *Purchase*.[19]

What are the differences?

Leslie Howard was a professional film actor and producer. His profession consisted in producing and acting in films for reward. Peter Cheyney was a professional author. His profession consisted in the writing of literary works for reward. The sums sought to be taxed in Howard's case (so far as now material) consisted of percentages or shares of the profits arising from the exploitation of films to the making of which he had contributed his professional services as an actor or producer or director, and constituted his reward for those services. The sums sought to be taxed in the present case (so far as the contracts made in Cheyney's lifetime are concerned) consisted of royalties based on sales of books written by him in the ordinary course of his profession, and constituted his reward for his professional activities in the shape of the writing of those books. Indeed, in those instances in which the books dealt with by Cheyney's contracts with publishers were yet to be written one may say that the royalties constituted (in part at all events) remuneration for his professional services in writing the books. In each case everything required to be done by Howard or Cheyney in order to earn the sums in question had been done during the continuance of the profession. In each case the sums in question were in the nature of periodical payments which did not become payable, and were not quantified or capable of quantification, until after the profession had been discontinued.

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[19] [1952] A.C. 280.

So far the parallel between the two cases seems as close as it well could be, given the differences in the character of the two professions. We can found no material distinction on the circumstance that whereas the sums in question in Howard's case can be described with complete accuracy as remuneration for professional services, the sums in question in Cheyney's case are more aptly described as the reward for his professional activities. It is clear that the principle stated in *Bennett* v. *Ogston*[20] applies to professional activities whether or not they consist of the rendering of services. See *per* Lord Simonds L.C. in *Stainer's Executors* v. *Purchase*,[21] in the passage already quoted, where he says of the payments in Howard's case that they "retained the essential quality of being the fruit of his professional activity." See also the second paragraph of Lord Asquith's speech, where he says[22]: "It seems clear that the "payments whose liability to tax is in issue were exclusively the "fruit or aftermath of the professional activities of Mr. Leslie "Howard during his lifetime."

Mr. Magnus has argued that there is an essential ground of distinction between the two cases. He says that whereas the sums in question in Howard's case were simply and solely remuneration for professional services rendered during the continuance of the profession, the sums in question in Cheyney's case were payments for property in the shape of the copyrights. He puts it that every time Cheyney wrote a book he created for himself property in the shape of the copyright in the work, and that the copyright in each work as and when brought into existence constituted a potential source of income which became an actual source of income when a contract providing for royalty payments was entered into with a publisher. Therefore, says Mr. Magnus, the royalties in the present case were income from property, namely, the copyrights. He admits that during the continuance of the profession the royalties received were receipts of the profession to be included in the computation of its profits under Case II of Schedule D and could not be taxed under Case III or Case VI. But he says that on discontinuance the royalties lost their character as profits or gains of the profession and became simply income from property, namely, the copyrights, which thenceforth were substituted for the profession as their source, and as such became taxable under Case III or Case VI.

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[20] 15 T.C. 374.

[21] [1952] A.C. 280, 289.

[22] Ibid. 290.

We do not feel able to accept this argument consistently with the speeches in *Stainer's Executors* v. *Purchase*.[23] We quote again from the speech of Lord Simonds L.C., where he said [24]: "My Lords, it appears to me that the issue is confused by "raising in general terms the question whether professional "remuneration may in certain circumstances assume a different "character for tax purposes when the taxpayer is dead or has "retired. At least the case of *Asher* v. *London Film Productions Ltd.*[25] is no authority for such a proposition. In that "case there was no question of the same sum assuming a different "quality in changing conditions. I am content to assume that "there may be such a case though I find it difficult to imagine. "But here I cannot see how or where the change takes place. "The source of these payments was the professional activity of "Mr. Howard: it was never anything else. It is true that his "remuneration took the form of annual payments which, if "other conditions were satisfied, might fall within Case III. "But other conditions were not satisfied, for ex hypothesi the "source of the remuneration was the exercise of a profession "falling within Case II. Then your Lordships were pressed, "particularly by junior counsel for the Crown, with the argument "that the remuneration of Mr. Howard took the form of an "'income-bearing asset' which became assessable after his "death in the hands of his executors. I am not sure that I "correctly apprehend the argument, though I can well understand that if a professional man receives as remuneration for "his services the sum of £1,000 2½ per cent. Consols. and retains "them he will suffer deduction of tax from the interest. But "I do not understand in what sense the sums of money receivable by Mr. Howard can be described as an income-bearing "asset. At one time it appeared to be urged that the several "contracts, which at once imposed obligations upon Mr. Howard "and created rights in him, were income-bearing assets, the "income being the remuneration paid under them. Jenkins

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[23] [1952] A.C. 280.

[24] Ibid. 289.

[25] [1944] K.B. 133; 60 T.L.R. 115; [1944] 1 All E.R. 77.

"L.J.[26] described this argument as 'placing a strained and "'artificial construction on these contracts' and I am content "to dismiss, without using more vigorous language, a contention "that wholly disregards both the forms and substance of the "transaction. If I am right in thinking that the sums in "question were not assessable under Case III because they were "nothing else than remuneration professionally earned by Mr. "Howard in his lifetime, this disposes also of the alternative "claim under Case VI."

We would refer also to the speech of Lord Asquith, from which, although it has been set out in extenso in the judgment of Harman J., we venture to quote this passage[27]: "Applying "this principle" (i.e., the principle stated in *Bennett* v. *Ogston*[28]) "to the facts of the present case prima facie the "resulting conclusion can only be that the payments in issue "escape tax. It is, however, contended by the Crown that in "*Bennett* v. *Ogston*[28] the reason why the principle involving "exemption did not apply was that when the moneylender died "there was outstanding an income-bearing asset (namely, that "part of the principal which was then unrepaid) which continued "to earn income, as it were, in its own right. It was argued for "the Crown that the same was the case here, the income-bearing "asset consisting of the contracts made by Leslie Howard whereunder the payments in question were posthumously made. "There seems to me, however, to be a very clear distinction "between 'income-bearing assets' for the purpose of this type "of case and the contracts in question. If Mr. Leslie Howard "had stipulated for payment in blocks of shares or bonds, or any "other instruments which by their independent vitality generate "income, the dividends or interest might well have been taxable "in the hands of his executors. The contracts in the present case "enjoy, in my view, no such independent vitality."

It is no doubt true that Cheyney obtained his royalties by licensing the copyright in his works to publishers. But the copyright did not drop from the skies. It was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted.

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[26] 32 T.C. 367, 405.

[27] [1952] A.C. 280, 291.

[28] 15 T.C. 374.

Mr. Magnus, in reliance on the actual decision in *Bennett* v. *Ogston*,[29] has submitted that the royalties received after Cheyney's death were in the same case as the interest received after the moneylender's death. The interest (says Mr. Magnus) was taxable because it was attributable to a period subsequent to the discontinuance of the moneylender's business. So here (he submits) the royalties received after the death of Cheyney were attributable to the use of the copyright for periods subsequent to the discontinuance of Cheyney's profession. We do not think this comparison is sound. The royalties were not payable by reference to periods of time but by reference to copies sold. They were the measure of the reward to be received by Cheyney for his professional activity in the production of original and therefore copyright works. If Cheyney had chosen to license or assign any of his copyright works to publishers for a lump sum the sum received would have differed from the royalties only in point of quantification and mode of payment, and not in the essential character common to both, namely, that of a reward for professional activities wholly completed at the date of discontinuance.

Mr. Magnus has also raised an argument based on Cheyney's residual interests in the copyrights.

For example, the rights granted by the first and second specimen agreements were limited to publication and sale in volume form in the English language, while those granted by the third specimen agreement were limited to publication in volume form in the United States of America, with an additional provision for the equal division of the proceeds of sale of selection, abridgment and second serial rights. So, says Mr. Magnus, Cheyney was left with potential but untapped sources of income in the shape of the rights in other modes of reproduction or in respect of publication in other parts of the world. We do not see that this makes any difference. So far as these residual rights were disposed of on a royalty basis by contracts made during the continuance of the profession, they would go to swell the profits and gains of the profession taxable under Case II of Schedule D. So far as they were similarly disposed of by contracts made after discontinuance the proceeds in the form of royalties would admittedly fall within Case III or Case VI of the Schedule. That does not, so far as we can see, displace the

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[29] 15 T.C. 374.

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1957

Carson (Inspector of Taxes) v. Cheyney's Executor.

conclusion that on the principle of *Stainer's Executors* v. *Purchase*[30] the proceeds of such contracts as Cheyney did make during the continuance of his profession were professional earnings and nothing else, whether received before or after discontinuance.

It is interesting to note that in *Stainer's Executors* v. *Purchase*[30] leading counsel for the taxpayers, at the conclusion of his reply, said[31]: "These sums are remuneration. The case "is not like that of a copyright which resembles a block of "shares, acquired in the course of exercising a profession, which "afterwards continues to produce income." This implies recognition that different considerations might apply to a case such as the present one. But it overstates the point in favour of the Crown, inasmuch as copyrights do not produce income "in "their own right" or proprio vigore. Contracts licensing or disposing of copyrights may result in the receipt by the person licensing or disposing of them of valuable consideration which may be in the form of periodical payments or in the form of a lump sum, and the question is as to the quality or character of those receipts.

We confess we regard this case as perhaps providing a somewhat stronger argument for the Crown than did *Stainer's Executors* v. *Purchase*,[32] but giving the matter the best consideration we can we see no sufficient ground to justify this court in distinguishing that case, and would accordingly dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Inland Revenue; Frere, Cholmeley & Nicholsons.*

J. A. G.

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[30] [1952] A.C. 280.
[31] Ibid. 286.
[32] Ibid. 280.

GREY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

1957
Nov. 27, 28;
Dec. 3.

Upjohn J.

[1957 No. 52.]

Revenue — Stamp duty — Gifts inter vivos — Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees —Oral direction to trustees to hold shares on trusts of settlements— Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74.

In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the 1950 settlement, to the intent that such direction should result in the entire exclusion of H. from all future right, title and benefit to or in the shares and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust which H., although not expressed to be a party thereto, executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund.

On appeal from an assessment of the six declarations of trust to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held, (1) that the disposition of the equitable interest by oral direction to the trustees operated as a disposition by way of trust and not by way of assignment, and a disposition by way of trust was not within the intendment of section 53 (1) (*c*) of the Law of Property Act, 1925, and so not required to be in writing; accordingly, H.'s equitable interest passed to the appellants on February 18, 1955, under the oral direction, and there being nothing left to pass under the subsequent declarations of trust, no ad valorem duty was thereby attracted.

(2) That the court could not draw the inference that the oral direction of February 18, 1955, and the subsequent declarations were all part of the same transaction.

Cohen and Moore v. *Inland Revenue Commissioners* [1933] 2 K.B. 126 distinguished.

CASE STATED under section 13 of the Stamp Act, 1891.

The appellants appealed from an assessment of the Inland Revenue Commissioners, who had assessed six declarations of trust dated March 25, 1957, by the appellants to ad valorem stamp duty as voluntary dispositions within the meaning of section 74 of the Finance (1909–10) Act, 1910.

The facts appearing in the case stated were summarized by Upjohn J. as follows: During 1949 Edward William Hunter made five settlements, one in favour of each of his five young grandchildren, whereby he settled certain property on the particular grandchild if he should attain the age of 35 years, with trusts over on failure to attain that age. On May 1, 1950, he made a sixth settlement on his then existing and certain possible after-born grandchildren. The appellants were the trustees of all the six settlements.

On February 1, 1955, Hunter transferred to the appellants as his nominees 18,000 ordinary shares of £1 each in the Sun Engraving Co. Ltd. (hereinafter called "the company"). On February 18, 1955, at the offices of the company, Hunter orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 in favour of his respective grandchildren, and as to 3,000 shares on the trusts of the 1950 settlement, to the intent that such direction should result in the entire exclusion of Hunter from all future right, title or benefit to or in the said shares or any of them and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust, all in similar form, and Hunter, although not expressed to be a party, executed each of them. They recited that the appellants were the holders of 3,000 ordinary shares in the company. They also recited Hunter's oral direction made on February 18, 1955, the acceptance by the appellants of the trust reposed in them by Hunter's direction; and that the giving of the direction and its nature were testified by the execution by Hunter of the deed. The operative part of each deed was as follows:—

"Now this deed witnesseth and the trustees hereby acknow-"ledge and declare that they have been since the date of "inception and are now holding the said shares specified in the "said schedule hereto and the income thereof upon such trusts "and with and subject to such powers and provisions as are by "and in the said settlement declared and contained concerning "the trust fund as therein defined or such of the same trusts "powers and provisions as are now or may hereafter be sub-"sisting or capable of taking effect to the intent that the said "shares should since the date of inception form an addition to "and be one fund with the said trust fund for all purposes."

It was agreed that the value of each ordinary £1 share in the company was £3 10s. on March 25, 1955.

The commissioners were of opinion that each declaration of trust was a conveyance or transfer by Hunter of his equitable interest in the shares referred to in that instrument and such conveyance or transfer operating as a voluntary disposition inter vivos within section 74 of the Finance (1909–10) Act, 1910, was liable to ad valorem duty accordingly. They accordingly assessed the duty with which each instrument was charged at £210 ad valorem duty. The appellants contended that each instrument was no more than a record under seal of what had already taken place; that it was not a conveyance or transfer operating as a voluntary disposition inter vivos, and that each was chargeable with a fixed duty of 10s. only under the head "Declaration of any use or trust" in the First Schedule to the Stamp Act, 1891.

J. Neville Gray Q.C. and *W. T. Elverston* for the taxpayers. There is a clear distinction under the Statute of Frauds between an assignment and a declaration of trust. The essential matter in a declaration of trust is that the declarant proves that he has parted with the legal title of property; as regards his beneficial interest, he is putting it outside his power to deal with it otherwise than in accordance with the trust. Eight propositions are put forward: (1) It is established that a binding declaration of trust may be made either in writing or orally. (2) A valid disposition of property may be made either by parting with the legal as well as the equitable estate, or by a properly proved declaration of trust. (3) A declaration of trust may be made either (i) by a statement that the declarant will hold the interest on stated trusts, or (ii) by directions to the holder of the legal title to hold it on stated trusts. (4) A declaration of trust, if properly proved, is sufficient to establish the title of the beneficiary; further, the interest to which it relates is legal or equitable. It does not operate as an assignment. (5) The contrast between the title given by a declaration of trust and by an assignment or transfer runs through all the cases dealing with voluntary transfers. (6) There is no authority for the proposition that, if the declarant holds the legal title, a declaration of trust must amount to an assignment, or that, if the declarant only holds the equitable title, any declaration of trust must amount to an assignment. (7) There is authority that a written declaration of trust is effective, although the declarant has already parted with the legal title and only has an equitable interest. (8) There is no difference in principle between written and oral declarations of trust. There is ample authority which recognizes that they are of like effect. The inference is that a valid declaration of trust concerning an interest which is only equitable can be made by word of mouth alone, and that is so notwithstanding the Statute of Frauds. Both the Statute of Frauds and the Law of Property Act, 1925, require writing for a declaration of trust of land, but not of personalty, and distinguish between assignments and declarations of trust.

[Reference was made to *Milroy* v. *Lord* [1]; *M'Fadden* v. *Jenkyns* [2]; *Cohen and Moore* v. *Inland Revenue Commissioners* [3]; *Fitzroy* v. *Cave* [4]; *Collinson* v. *Pattrick.*[5]]

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. The six declarations were transfers of an equitable interest. The question is, What was done by the settlor when he gave the verbal direction? When beneficial directions are given to trustees in whom, as here, a legal estate is vested, it is not a declaration of trust within *Milroy* v. *Lord* [6]—the direction would have been ineffective without the subsequent deed.

A direction given by a beneficial owner to trustees takes effect as an assignment by the beneficial owner: see *Martin* v. *Inland Revenue Commissioners.*[7] In the present case there was an attempted equitable assignment which, not being in writing, was invalid under section 53 of the Law of Property Act, 1925; accordingly, the declarations did not pass the equitable interest, and duty is payable. [Reference was made to *In re Chrimes* [8];

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[1] (1862) 4 De G.F. & J. 264.

[2] (1842) 1 Phillips 153.

[3] [1933] 2 K.B. 126.

[4] [1905] 2 K.B. 364; 21 T.L.R. 612.

[5] (1838) 2 Keen 123.

[6] 4 De G.F. & J. 264.

[7] (1930) 15 A.T.C. 631.

[8] [1917] 1 Ch. 30.

Timpson's Executors v. *Yerbury*[9]; *Edwards* v. *Jones*[10]; *Wheatley* v. *Purr*[11]; *Rycroft* v. *Christy*[12]; *Peterson* v. *Murphy*[13]; *Bentley* v. *Mackay*.[14]]

Cur. adv. vult.

December 3. UPJOHN J. read the following judgment in which he stated the facts and continued: The real point at issue between the parties may be very shortly stated. The appellants concede, of course, that the equitable interest in the 18,000 shares in the company remained in Hunter until February 18, for the appellants were mere nominees for him, but they claim that on the giving of the directions on that day the equitable interest passed from Hunter and vested as to each block of 3,000 shares on the trusts declared respectively by the six settlements executed in 1949 and 1950. The trusts, it was argued, were then completely declared and nothing remained to be done. Therefore, no property passed in and by the declarations of trust when they were executed on March 25, 1955, and there was nothing to be stamped ad valorem.

The commissioners' reply to that argument is that nothing passed by virtue of the oral directions, for the reason that if an equitable owner gives directions to trustees in whom the legal estate is outstanding as to trusts concerning the equitable interest, that in terms is an equitable assignment and as such must be in writing having regard to section 53 (1) (*c*) of the Law of Property Act, 1925. If that be right then Mr. Neville Gray, for the appellants, concedes that the subsequent declarations of trust did operate to pass the equitable interest, and that he is liable to the full ad valorem duty under section 74 of the Finance (1909–10) Act, 1910, and I have not been troubled with any arguments based on an alternative claim to settlement duty. The essential question is whether the commissioners' view that the oral directions given by Hunter were ineffectual to transfer any equitable estate from him is correct.

If their primary argument is wrong, the commissioners have submitted an alternative argument to the effect that the oral directions on February 18 and the subsequent declarations on March 25 must be taken and read together. Thus it was said it was, in effect, all one transaction and the declarations must be stamped as the final operative documents as was done in *Cohen and Moore* v. *Inland Revenue Commissioners.*[1] This is primarily a question of fact. Whether without further evidence the commissioners could properly have drawn the inference that the oral directions and subsequent written declarations were all part of one transaction I do not decide, but apparently they did not do so, for there is no finding of fact to that effect in the case stated. I doubt whether in the absence of such a finding of fact it is open to me to draw any such inference, but, even if it is, I do not think I ought to do so. Unlike *Cohen and Moore's* case,[2] there is no evidence that the six declarations were in draft at the time of the oral directions. It is at least possible that they were brought into existence as the result of second thoughts after February 18 when it was realized that these trusts were for very young grandchildren and would last a long time and that some written record was desirable. At all events I do not think that I can draw the required inference.

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[9] [1936] 1 K.B. 645; [1936] 1 All E.R. 186.

[10] (1836) 1 My. & Cr. 226.

[11] (1837) 1 Keen 551.

[12] (1840) 3 Beav. 238.

[13] (1853) 11 Hare 88.

[14] (1851) 15 Beav. 12.

I turn to the main point. I propose to deal with the matter in the first place as though the relevant law concerning assignments was contained in section 9 of the Statute of Frauds. The section is in these terms: "And be it further enacted, that all "grants and assignments of any trust or confidence shall likewise "be in writing, signed by the party granting or assigning the "same, or by such last will or devise, or else shall likewise be "utterly void and of none effect." I am dealing in this case with the voluntary transfer of an equitable interest in pure personalty where the legal estate is already outstanding in nominees, and my observations are confined to that type of transaction. In such a case the donor may effect a transfer of the equitable interest to the donee in one of three ways. See authority, if authority be wanted for that proposition, Romer L.J. in *Timpson's Executors* v. *Yerbury.*[3] (1) The donor may assign his equitable interest to the donee directly. However informal the language used it must on its true interpretation amount to a transaction in essence of direct transfer of the equitable interest from donor to donee in contrast to a declaration of trust; that is something which in the ultimate analysis is of the nature "I hereby assign or give to you." Having regard to the Statute of Frauds such an assignment to be effectual must be in writing. (2) The donor may declare himself a trustee of the equitable interest vested in him for the benefit of the donee.

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[1] [1933] 2 K.B. 126.

[2] Ibid.

[3] [1936] 1 K.B. 645; [1936] 1 All E.R. 186.

Such a declaration may be by parol or in writing. There are many authorities to that effect. Perhaps the best known is the classic judgment of Turner L.J. in *Milroy* v. *Lord*.[4] (3) The donor may direct the trustees to hold the whole or part of his equitable interest on trust for a third person. That, said Sargant L.J. in *In re Chrimes*,[5] "operates as a complete and effectual transfer "of the interest to which the direction extends." Whichever of these methods of transfer is employed the result is the same; the equitable interest is effectually transferred from donor to donee. If done by way of assignment, however, it must be in writing; if by declaration of trust it may be by parol. And it is very familiar law that a purported assignment will not be construed as a declaration of trust to avoid the want of writing: *Milroy* v. *Lord*.[6] On which side of the line does a direction to the trustees lie? May it effectually be given by parol or not?

It has been strenuously urged on me that the words of Sargant L.J. in *In re Chrimes*,[7] the classification of Romer L.J. in the *Timpson's Executors* case,[8] and some words of my own in *In re Wale*,[9] showed that a direction to trustees to hold on new trusts operated not by way of trust but by way of assignment; that such a direction was in fact an assignment. In none of those cases did the point that I have to consider arise, and I am quite unable to accept the argument that those authorities indicate that a direction to trustees is not merely equivalent to, but is an assignment. There are three different methods of effectuating the same result, i.e., a transfer of the equitable interest from donor to donee, and in that sense it is perfectly correct to say (where a precise analysis of each method is unnecessary as in the authorities I have just mentioned) that each method operated as an assignment from donor to donee. In fact, Sargant and Romer L.JJ. were both careful to employ rather different language, which lent no colour to the view that a direction to trustees was an assignment.

In my judgment a direction to trustees to hold trust property on trust for a donee operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment. In the first place the element of assignment, that is of direct passing of the equitable interest from donor to donee by appropriate words of assignment or gift, are lacking. Secondly, the only person who can effectively declare new trusts concerning the equitable interest is the donor himself: *Tierney* v. *Wood.*[10] For myself, I can see no real distinction between the two cases that may be put: (1) the donor says: "I declare myself a trustee "of my equitable interest for the donee"; the legal effect of that is that the trustees become trustees of the equitable interest for the donee and the donor disappears from the picture; and (2) the donor says: "I direct you the trustees to hold upon "trust for the donee." Both seem to me to be really indistinguishable methods of operating to transfer the equitable title by way of declaration of trust in contrast to doing so by way of assignment. By giving directions to trustees as to new trusts it seems to me that the donor has deliberately chosen the path of declaring new trusts rather than the path of assignment.

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[4] (1862) 4 De G.F. & J. 264.
[5] [1917] 1 Ch. 30.
[6] 4 De G.F. & J. 264.
[7] [1917] 1 Ch. 30, 36.
[8] [1936] 1 K.B. 645, 664.
[9] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280, 283.

For these reasons, in my judgment, a direction to trustees operates by way of trust and not for the purposes of section 9 of the Statute of Frauds by way of assignment. Accordingly, such a direction may be by parol. No decision directly in point has been cited to me, but I think some support for the view I have expressed is to be found in the observations of Lord Lyndhurst L.C. in *M'Fadden* v. *Jenkyns*,[11] and in *Bentley* v. *Mackay.*[12]

So far I have dealt with the matter on the footing that the law is contained in section 9 of the Statute of Frauds. Of course, that section has been repealed and replaced by section 53 (1) (*c*) of the Law of Property Act, 1925, in these terms: "a disposition "of an equitable interest or trust subsisting at the time of the "disposition, must be in writing signed by the person disposing "of the same, or by his agent thereunto lawfully authorized in "writing or by will." The section uses the word "disposition," normally a word of wide import, but if it is to be given a wide meaning so as to include a disposition by direction to trustees then surely it must include a disposition by way of declaration of trust on the part of the equitable owner. If that be so, then for close on 32 years the law relating to the transfer of equitable interests by parol declaration of trust of equitable (as distinct from legal) interests was completely altered and no one has yet noticed it, and neither of those well-known books on trusts, Lewin and Underhill, have thought the possibility that such a change in the law may have been occasioned by the change of language even worthy of comment. In fairness to the commissioners this point was not pressed very hard. I am satisfied that section 53

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[10] (1854) 19 Beav. 330.

[11] (1842) 1 Phillips 153.

[12] (1851) 15 Beav. 12.

(1) (*c*) was directed at precisely the type of disposition which fell within the old section 9, i.e., assignments in contradistinction to the transfer of equitable interests by way of declaration of trust. In my judgment dispositions by way of trust are not within the intendment of the section.

Accordingly, in my view, the equitable interest in the shares passed from Hunter on February 18, 1955, and there being nothing left to pass under the subsequent declaration of trust no ad valorem duty was thereby attracted.

The appeal is allowed, the ad valorem duty must be repaid and the commissioners must pay the appellants' costs of the appeal.

Appeal allowed.

Solicitors: *Soames, Edwards & Jones; Solicitor, Inland Revenue.*

J. L. D.
P. P.

OUGHTRED *v.* INLAND REVENUE COMMISSIONERS.

[1957 No. 29.] (p. 678)

1957
Nov. 28, 29;
Dec. 3.

Upjohn J.

Revenue — Stamp duty — Gifts inter vivos — Settlement — Oral agreement for value for transfer of reversionary interest to tenant for life—Subsequent deed of transfer—Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*) (2)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, the appellant was the tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son P. was absolutely entitled to the shares subject to the appellant's life interest. By an oral agreement made on June 18, 1956, it was agreed between the appellant and P. that P., on June 26, would exchange his interest under the settlement and subsequent deeds for certain shares in the same company then owned by the appellant to the intent that the appellant's life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the appellant, P. and the trustees, the appellant and P. gave a release to the trustees. The deed recited the oral agreement and that the trust fund, consisting of the shares, "is accordingly now held in trust "for [the appellant] absolutely," and that it was intended to transfer them to the appellant, such transfer being the consideration for the release. On the same day, by a deed made between the appellant, P. and the trustees, the trust fund of 100,000 preference shares and 100,000 ordinary shares was transferred to the appellant in consideration of ten shillings.

On appeal from an assessment on the deed of transfer to ad valorem duty on the value of P.'s reversionary interest:—

Held, (1) that on the making of the oral agreement for value on June 18, P. became a constructive trustee of his equitable reversionary interest in the trust fund for the appellant; no writing was necessary to achieve that result and section 53 of the Law of Property Act, 1925, was inapplicable to constructive trusts; accordingly, only the legal estate passed under the deed of transfer and ad valorem duty was not attracted.

(2) That the transfer was a transfer on the winding up of the trust and the release of the trustees, and was not a conveyance on sale within section 54 of the Stamp Act, 1891.

CASE STATED under section 13 of the Stamp Act, 1891.

The appellant appealed from an assessment of ad valorem stamp duty on a deed of transfer dated June 26, 1956, whereby four transferors were expressed to transfer 100,000 preference shares and 100,000 ordinary shares of 10s. each to the appellant in consideration of 10s.

The case stated, so far as relevant, provided: The transferors were the trustees of a settlement (hereinafter called "the settlement") dated January 1, 1924, and made between George Jackson Bentham, of the one part, and William Edward Cooper, Norman Oughtred, John Alwyn Oughtred, the appellant, Phyllis Brown Oughtred, and Doris Strachan Oughtred, of the other part, whereby certain shares in William Jackson & Son Ltd. were settled upon trust for the appellant during her life, and after her death for such of her issue as she should by deed or will appoint, and subject to any such appointment for such of her children who attained the age of 21 years, and if more than one in equal shares, and subject thereto for the said Doris Strachan Oughtred. At all material times the property subject to the trusts of the settlement consisted of 100,000 ordinary shares and 100,000 preference shares in William Jackson & Son Ltd., which at all material times prior to the transfer to the appellant were held by the transferors. The appellant was married once and once only, and had one child and no more, namely, Peter Bentham Oughtred (hereinafter called "Peter"), who was living and of age on the date of the transfer to the appellant. By a deed of appointment dated June 18, 1956, and made by the appellant, the trust fund, subject to the trusts of the settlement, was appointed to Peter absolutely, subject to the life interest of the appellant and to the power of revocation reserved in the said deed of appointment. By a deed of release dated June 18, 1956, and made by the appellant, the said power of revocation was released. By an oral agreement made June 18, 1956, between the appellant and Peter it was agreed that Peter would on June 26, 1956, exchange his interest under the settlement and hereinbefore recited deed of appointment and deed of release for 28,510 fully paid preference shares of 10s. each, and 44,190 fully paid ordinary shares of 10s. each in the capital of William Jackson & Son Ltd., then owned by the appellant to the intent that the life interest of the appellant in the trust fund should be enlarged into absolute ownership thereof.

By a deed of release made June 26, 1956, between the appellant of the first part, Peter of the second part, and the transferors of the third part, after reciting (inter alia) the said oral agreement, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was "accordingly "now held by the trustees in trust for" the appellant absolutely, that it was intended that the same should forthwith be transferred to the appellant or as she should direct and that the appellant and Peter, being satisfied with all matters and things relating to the execution of the trusts of the said settlement, had agreed to make the release thereinafter contained the appellant and Peter released and discharged the transferors from all actions, proceedings, claims and demands in respect of the execution of the said settlement. By the transfer to the appellant the transferors transferred to the appellant the said 100,000 ordinary shares and 100,000 preference shares, and on the same date the appellant, by the direction of her son Peter, transferred to Donald Miller Jones and Noel Oughtred Till 28,510 first preference shares of 10s. each and 44,190 ordinary shares of 10s. each in William Jackson & Son Ltd. Donald Miller Jones and Noel Oughtred Till were trustees of a trust deed dated June 26, 1956, to which they and the appellant's son Peter were parties, and according to the trusts declared by that deed held the said 28,510 preference shares and 44,190 ordinary shares as trustees or nominees for Peter.

The said deed of release dated June 26, 1956, and made between the appellant of the first part, Peter of the second part, and the transferors of the third part; the said transfer of 28,510 first preference shares and 44,190 ordinary shares of William Jackson & Son Ltd.; and the said trust deed dated June 26, 1956, were presented for adjudication with the transfer to the appellant, and the duty on each of them was assessed at 10s.

In paragraph 12 of the case stated the commissioners stated that they were of the opinion that the oral agreement made on June 18, 1956, between the appellant and her son Peter was, for the purposes of the Stamp Act, 1891, and particularly of section 55 thereof, an agreement for sale by Peter to the appellant of his equitable reversionary interest in the property comprised in the settlement of January 1, 1924 (namely, the 100,000 ordinary and 100,000 preference shares), in consideration of the said 28,510 preference and 44,190 ordinary shares. The commissioners were further of opinion that, having regard to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925, the recital in the said deed of release of June 26, 1956, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was " accordingly " now held by the trustees in trust for " the appellant absolutely was incorrect. Except for the transfer to the appellant no instrument in writing stamped with ad valorem duty transferring to the appellant Peter's equitable reversionary interest was produced to the commissioners. The commissioners were of the opinion that the transfer to the appellant of the said 100,000 preference shares and 100,000 ordinary shares was an instrument whereby the said equitable interest of Peter in such shares was upon the sale thereof to the appellant transferred to or vested in her and was accordingly a conveyance on sale of such equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of the transfer to the appellant of the said 28,510 preference shares and 44,190 ordinary shares. The commissioners were also of opinion that the transfer to the appellant was a transfer not on sale to the appellant of the legal interest in the said 100,000 preference shares and 100,000 ordinary shares.

The commissioners accordingly assessed the duty under the provisions of sections 1, 4 and 55 of the Stamp Act, 1891, and the heads of charge " Conveyance or Transfer on sale " and " Conveyance or Transfer of any kind not hereinbefore described " in the First Schedule to that Act and other relevant statutory provisions as follows:

Ad valorem transfer on sale duty on £33,140 ...	£663	0	0
and the fixed duty		10	0
Total duty on the transfer to the appellant ...	£663	10	0

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No objection was made by the appellant to the assessment of 10s. duty on the transfer to the appellant, but the appellant contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer, and that it was liable to the duty of 10s. only under the head of charge "Conveyance or "Transfer of any kind not hereinbefore described" in the First Schedule to the Stamp Act, 1891, and being dissatisfied with the assessment made and having paid the duty in accordance therewith the appellant appealed against the said assessment to the High Court.

The questions for the opinion of the court were: (i) whether the transfer to the appellant is liable to duty as assessed by the commissioners; (ii) if not, to what duty it was liable.

Peter Whitworth for the taxpayer. The transfer was a transfer of the trust fund in specie. It was not an assignment of an equitable reversion, for it makes no mention of such reversion, which had already ceased to exist. Even if the reversion had still existed, it would have consisted of a right of action against the trustees, which ex hypothesi they could not assign any more than a debtor can assign his debt. Peter did not execute the transfer. The sole purpose of the transfer was to have the legal title vested in the appellant, the equitable title having already passed.

Section 53 (1) (*c*) of the Law of Property Act, 1925, is, in any case, irrelevant, because we are not concerned to establish here whether or not the appellant acquired a good title; the only question is "what duty does the transfer attract?" But, even if it is relevant, section 53 (1) (*c*) has no application to constructive trusts. On the making of the oral agreement to exchange, Peter became constructive trustee of the reversion for the appellant. The recital in the deed of release was therefore correct. But, even if it were incorrect, all the parties to that release would be estopped from denying it and therefore the effect would be the same.

It is common ground that the transfer attracted 10s. duty as a transfer of shares. To attract the further duty (under section 4 (*a*) of the Stamp Act, 1891), it would have to relate to or contain the sale of the reversion, but it did neither. There is no case where section 4 has been applied to a transaction not mentioned in the document. Even the commissioners have tacitly admitted that the transfer did not attract additional duty as an assignment of the appellant's life interest; why, then, should it attract duty on the reversion? [Reference was made to *Shaw* v. *Foster* [1]; *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [2]; *Fleetwood-Hesketh* v. *Inland Revenue Commissioners* [3]; *Cohen and Moore* v. *Inland Revenue Commissioners* [4]; *Hadgett* v. *Inland Revenue Commissioners* [5]; *Drages Ltd.* v. *Inland Revenue Commissioners* [6]; *General Accident Assurance Corporation* v. *Inland Revenue Commissioners* [7]; *Freeman* v. *Inland Revenue Commissioners*.[8]]

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. The oral agreement of June 18, 1956, was an agreement for sale by Peter of his equitable reversionary interest in the property comprised in the settlement of January 1, 1924, and the transfer to the appellant was a conveyance on sale of the equitable interest and liable to ad valorem duty on the £33,140, being the agreed value at the date of the transfer to the appellant of the 28,510 preference shares and the 44,190 ordinary shares. [Reference was made to *Coats* v. *Inland Revenue Commissioners* [9]; *Lord Portman* v. *Inland Revenue Commissioners* [10]; *Bristol (Marquess)* v. *Inland Revenue Commissioners* [11]; *Faber* v. *Inland Revenue Commissioners* [12]; *Horsfall* v. *Hey* [13]; *Garnett* v. *Inland Revenue Commissioners*.[14]]

Cur. adv. vult.

December 3. UPJOHN J. read the following judgment. In this case the Inland Revenue claim ad valorem duty on a deed of transfer dated June 26, 1956 (which I shall call "the transfer"), whereby four transferors were expressed to transfer 100,000 preference shares of 10s. each and 100,000 ordinary shares of 10s. each in a company known as William Jackson & Son Ltd. (which I shall call "the company"), to the appellant in consideration of ten shillings. The facts are fully set out in the case stated and only a brief recital of them is necessary. The Crown relies in support of its claim principally on section 53 of the Law of Property Act, 1925.

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[1] (1879) L.R. 5 H.L. 321.

[2] [1957] 1 W.L.R. 174; [1957] 1 All E.R. 291.

[3] [1936] 1 K.B. 351.

[4] [1933] 2 K.B. 126.

[5] (1877) L.R. 3 Ex. 46.

[6] (1927) 6 A.T.C. 727.

[7] (1906) 8 Fraser 477.

[8] (1871) L.R. 6 Ex. 101.

[9] [1897] 2 Q.B. 423; 13 T.L.R. 548.

[10] (1956) 35 A.T.C. 349.

[11] [1901] 2 K.B. 336; 17 T.L.R. 488.

[12] [1936] W.N. 112; [1936] 1 All E.R. 617.

[13] (1848) 2 Exch. 778.

[14] (1899) 81 L.T. 633.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, the appellant was the tenant for life of the shares, the subject-matter of the transfer, and her son Peter was absolutely and indefeasibly entitled to the said shares subject to his mother's life interest therein. The trustees of the settlement were the transferors named in the transfer. By an oral agreement made on the same day, June 18, it was agreed between the appellant and Peter that Peter would on June 26, 1956, exchange his interests under the settlement and subsequent deeds for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in the company then owned by the appellant to the intent that the life interest of the appellant in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the appellant of the first part, Peter of the second part, and the trustees of the third part, the parties of the first and second parts gave a release to the trustees. There were the usual ample recitals of the history of the trust and I need notice only recitals (F) and (G) and the consideration. Recital (F) of the release recited the oral agreement I have mentioned, and continued: "The trust fund which now consists of one hundred "thousand fully paid preference shares of ten shillings each in "the capital of William Jackson & Son Limited and one hundred "thousand fully paid ordinary shares of ten shillings each in the "said company is accordingly now held by the trustees in trust "for Mrs. Oughtred absolutely as the trustees hereby acknow-"ledge and it is intended that the same shall forthwith be trans-"ferred to Mrs. Oughtred or as she shall direct (G) Mrs. "Oughtred and Peter being satisfied with all matters and things "relating to the execution of the trusts of the settlement have "agreed to make the release hereinafter contained Now in "consideration of the premises and of the transfer to be made "as aforesaid this deed witnesseth . . .", and then followed the usual common form words of release to the trustees on the termination of a trust. On the same day the transfer was executed and the consideration moving from the appellant satisfied. It is not disputed that it operated to convey or transfer the legal estate in the shares from the trustees to the appellant and as such must bear 10s. stamp duty, but the Commissioners of Inland Revenue claim that it must be stamped ad valorem with the value of Peter's reversionary interest which he orally agreed to sell to his mother on June 18, and on that footing a sum of £663 10s. 0d. has been exacted by them.

The principal argument of the commissioners in support of their claim is to be found in paragraph 12 of the case stated and is to this effect. The agreement of exchange on June 18 (and for this purpose it is conceded on both sides that it is on all fours with an agreement of sale and purchase for a money consideration) was oral, and therefore, having regard to section 53 (1) (*c*) of the Law of Property Act, 1925, no equitable interest passed to the appellant. As I have just dealt at length in *Grey* v. *Inland Revenue Commissioners*[1] with that section, I do not read it again. Accordingly, the recital in the deed of release that the trust fund was "accordingly now held by the trustees in trust "for" the appellant was incorrect. Therefore Peter's equitable interest in the reversion passed on the transfer, which was accordingly a conveyance on sale of such equitable interest.

In my judgment Mr. Whitworth has provided a complete answer to that argument. It is to be found in section 53 (2) of the Law of Property Act, 1925, which is in these terms: "This "section does not affect the creation or operation of resulting, "implied or constructive trusts." This was an oral agreement for value, and accordingly, on the making thereof, Peter, the vendor, became a constructive trustee of his equitable reversionary interest in the trust funds for the appellant. No writing to achieve that result was necessary, for an agreement of sale and purchase of an equitable interest in personalty (other than chattels real) may be made orally, and section 53 has no application to a trust arising by construction of law.

It was said that if Peter became a trustee of the equitable interest for the appellant that showed that something (some scintilla of something possibly) remained in Peter which had to be transferred to the appellant to complete her equitable title. I do not follow the argument. As I have been at pains to point out in *Grey* v. *Inland Revenue Commissioners*,[2] there are several modes of transferring equitable estates. One is by the transferor declaring himself a trustee for the transferee. The same result must surely follow where the transferor becomes a trustee by construction of law. True, an agreement to sell an equitable interest may not be precisely on all fours with a conveyance of it. In the last-mentioned case the transferee may have the benefit of covenants for title by the transferor: *Inland Revenue*

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[1] Ante, p. 375.

[2] Ante, p. 380.

Commissioners v. *G. Angus & Co.*[3] But it cannot be doubted that on the making of an agreement for sale the equitable title to the property agreed to be sold passes to the purchaser and the recital in the deed of release to the effect that the trustees held the trust fund in trust for the appellant absolutely was in fact correct, for the exchange consideration was executed contemporaneously. I do not, therefore, propose to deal with the interesting arguments I have heard that even if the recital was erroneous the doctrine of estoppel precludes the claim for stamp duty. In my judgment nothing passed under the transfer except the legal estate, and the principal argument on the part of the commissioners falls to the ground.

Mr. Wilberforce advanced a further point, not taken or at all events not clearly taken in the case stated, to this effect. Even if the deed of transfer passed nothing except the legal estate yet the deed of transfer was a conveyance on sale within the meaning of section 54 of the Stamp Act. Section 54 is in these terms: "For the purposes of this Act the expression 'conveyance on "'sale' includes every instrument, and every decree or order "of any court or of any commissioners, whereby any property, "or any estate or interest in any property, upon the sale thereof "is transferred to or vested in a purchaser, or any other person "on his behalf or by his direction."

The test was said to be whether the deed of transfer was a transfer on the sale; and it was argued that the appellant became owner by virtue of the sale and the transfer was a transfer on that sale. You must look at the facts of each case. Plainly it is not essential that the vendor should be a party. For example, where shares are in the names of nominees the transfer from such nominees is plainly a conveyance on sale, and, despite Mr. Whitworth's submission to the contrary, in such a case it is not necessary to mention expressly the equitable interest in the deed of transfer. In this case, however, the appellant could not call on the trustees to convey the shares to her merely on proof of the oral agreement. They were entitled to say, and in this case presumably did say: "Here is a subsisting trust, and we will "not part with the trust assets except with the assent of every-"one who is interested in them upon having a release in the "usual way not only from you but from Peter. We are not "concerned with dealings between beneficiaries." Although the transfer was executed as a direct result of the agreement for sale and really on the occasion thereof, still it remains, in my judgment, incorrect in the particular circumstances of this case to describe it as a conveyance on sale. The transfer was, in my judgment, a transfer not on sale but on the winding up of the trust and on the release of the trustees. This point also fails.

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[3] (1889) 23 Q.B.D. 579, 595; 5 T.L.R. 697.

The appeal must be allowed. The ad valorem duty must be repaid. I fix the duty at ten shillings.

Appeal allowed.

Solicitors: *Moeran, Oughtred & Co. for Robinson, Sheffield & Till, Beverley, Yorkshire; Solicitor, Inland Revenue.*

J. L. D.
P. P.

1957
Dec. 6, 9, 20.

Upjohn J.

WESTERN UNITED INVESTMENT CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp duty—Conveyance or transfer on sale—Transfer by two documents—Agreement to sell shares and deed of transfer—Consideration payable over 125 *years—Whole amount due if instalment not paid—Whether duty on agreement as "primary security "for . . . sums of money at stated periods"—Whether duty on transfer payable on whole amount ultimately transferable—Interest on stamp duty repaid—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 13 (1) (4), 56 (2) (4), *Sch. I, para.* 1*—Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3.

By an agreement of May 9, 1956, the owner of certain shares agreed to sell them to the appellant company, the consideration being payable by 125 yearly instalments of £44,000 without interest, and amounting in all to £5,500,000. The first instalment under the agreement was payable on June 1, 1956. Clause 3 of the agreement provided that if the company should make default in payment of any of the instalments "after the same shall become due the whole "of the unpaid instalments shall become immediately payable . . ." The deed of transfer was also executed on May 9, 1956, for the convenience of the parties, but it was conceded that it should be treated for the purposes of stamp duty as if it had been executed on June 1, 1956.

The Inland Revenue Commissioners assessed the agreement to stamp duty of £13,750 (namely 5s. per £100 on the whole amount ultimately payable), under paragraph 1 of the First Schedule to the Stamp Act, 1891,[1] as being the only or principal or primary security for the periodical payments therein. They assessed the transfer to ad valorem duty pursuant to section 56 (2) of the Act at the rate of £1 for every £50 of the sum of £5,500,000, which under clause 3 of the agreement might become payable within the next 20 years. The company disputed the assessments but paid the amounts assessed and asked the commissioners to state a case under section 13 of the Act.

The company contended that the agreement was a "separate "instrument" for the purpose of section 56 (4) of the Act, and therefore chargeable with a duty of 10s. only; and that according to the terms of the sale the total amount payable under the agreement during the next 20 years was only £880,000 (i.e., 20 × £44,000) and that ad valorem duty on the transfer was only payable therefore on that amount, namely, the sum of £17,600:—

Held, (1) that the exemption in section 56 (4) of the Stamp Act, 1891, was only granted where there was first a conveyance on sale which was chargeable with duty and in that document or in a separate contemporaneous or subsequent instrument a security; and it was not sufficient to find that the parties had executed a security, even though they might intend thereafter to execute a conveyance on sale; the assessment of duty of £13,750 on the agreement was therefore correct.

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[1] Stamp Act, 1891, s. 13: "(1) "Any person who is dissatisfied "with the assessment of the com- "missioners may, within 21 days "after the date of the assessment, "and on payment of duty in con- "formity therewith, appeal against "the assessment to the High Court "of the part of the United Kingdom "in which the case has arisen, and "may for that purpose require the "commissioners to state and sign a "case, setting forth the question upon "which their opinion was required, "and the assessment made by them. ". . . (4) If it is decided by the court "that the assessment of the commis- "sioners is erroneous, any excess of "duty which may have been paid "in conformity with the erroneous "assessment, together with any fine "or penalty which may have been "paid in consequence thereof, shall be "ordered by the court to be repaid "to the appellant . . ."

S. 56: "(2) Where the considera- "tion, or any part of the considera- "tion, for a conveyance on sale con- "sists of money payable periodically "for a definite period exceeding 20 "years or in perpetuity, or for any "indefinite period not terminable with "life, the conveyance is to be charged "in respect of that consideration with "ad valorem duty on the total amount "which will or may, according to the "terms of sale, be payable during "the period of 20 years next after "the day of the date of the instru- "ment. . . . (4) Provided that no con- "veyance on sale chargeable with ad "valorem duty in respect of any "periodical payments, and containing "also provision for securing the pay- "ments, is to be charged with any "duty in respect of such provision, "and no separate instrument made in "that case for securing the payments "is to be charged with any higher "duty than ten shillings."

Sch. I. "Stamp Duties on In- "struments . . . Bond, covenant, or "instrument of any kind whatsoever ". . . (1) Being the only or principal "or primary security for . . . any sum "or sums of money at stated periods. ". . . Mortgage, bond, debenture, "covenant. . . ." [5s. per £100.] "Conveyance or transfer on sale—of "any property . . ." [£1 for every £50].

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WESTERN UNITED INVESTMENT CO. LTD. v. INLAND REVENUE COMMISSIONERS.

(2) That clause 3 was a term of the contract which only came into operation if the terms of the sale were broken; and the terms of the sale for the purpose of section 56 (2) were those on which the parties contemplated payment would be made for the property —i.e., 125 instalments of £44,000—and not those only coming into operation if the contract were broken; the duty payable was therefore £17,600, and the balance of the duty which had been paid under the assessment should be repaid.

Underground Electric Railways Co. of London Ltd. v. *Inland Revenue Commissioners* [1906] A.C. 21; 22 T.L.R. 160 distinguished.

(3) That the company was not entitled to interest on the duty repaid, since payment of duty under section 13 (1) of the Stamp Act was not payment of a debt within the meaning of section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934,[2] and the court had no jurisdiction to award interest on the duty wrongly paid under the assessment.

APPEAL from the Inland Revenue Commissioners.

By this appeal the court was asked to determine the stamp duty payable on two instruments presented to the Inland Revenue Commissioners on behalf of the appellant company, Western United Investment Co. Ltd., by its solicitors under section 12 of the Stamp Act, 1891, for their opinion as to the duty payable. The case stated by the commissioners pursuant to section 13 of the Act, so far as relevant, provided:

2. The instruments in question were (i) an agreement dated May 9, 1956, made between Edmund Hoyle Vestey of the one part and the appellant company of the other part and (ii) a deed of transfer also dated May 9, 1956, whereby certain shares were transferred by Vestey to the appellant company.

3. The agreement provided in clause 1 thereof that Vestey should sell and the appellant company should purchase, for the sum of £5,500,000, 29,800 ordinary shares of £10 each and 35,058 5 per cent. cumulative second preference shares of £10 each in the capital of Frederick Leyland & Co. Ltd. Clause 2 of the agreement provided that the purchase money should be paid without interest by 125 yearly instalments of £44,000 each to be paid on June 1 in each year, the first such instalment to be paid on June 1, 1956. Clause 3 provided that if the appellant company should make default in payment of any of the said instalments

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[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 3: "(1) In any "proceedings tried in any court of "record for the recovery of any debt or "damages, the court may, if it thinks "fit, order that there shall be included "in the sum for which judgment is "given interest at such rate as it "thinks fit on the whole or any part "of the debt or damages for the whole "or any part of the period between "the date when the cause of action "arose and the date of the judgment."

or any part thereof for 90 days after the same should have become due the whole of the unpaid instalments should become immediately payable and should carry interest at £4 per cent. per annum from the expiration of such 90 days until payment. Clause 4 provided (inter alia) that upon payment of the first of the said instalments Vestey should execute and the company should accept a transfer of all the said shares.

4. Notwithstanding the provisions of clause 4 of the agreement the transfer of the said shares was executed by Vestey on May 9, 1956. The circumstances in which both the agreement and the transfer were executed by Vestey on May 9, 1956, were set out in the following extract from a letter dated September 4, 1956, from Messrs. Chas. H. Wright and Brown, solicitors for Vestey and for the appellant company respectively, to the Controller of Stamps:—

" . . . Mr. Edmund Vestey was in Australia and was not " expected back and did not, in fact, arrive in this country until " June 20. In order that the documents should be available in " time for the first payment to be made on June 1, both agree- " ment and transfer were sent out to him by airmail and signed " by him on May 9, were executed on behalf of the Western " United Investment Co. Ltd., as soon as they arrived back " in this country, and were both presented for stamping at " the same time. The first instalment of £44,000 was paid on " June 1."

5. The transfer of the said shares was expressed to be made " in consideration of the sum of £5,500,000, payable by instal- " ments of £44,000 per annum over 125 years in accordance with " agreement dated May 9, 1956."

6. There was annexed thereto a copy of a letter dated May 4, 1956, from Messrs. Price, Waterhouse & Co. to one R. A. Vestey in which a partner in that firm considered the problem " What " would be a fair value to place on the shares in Frederick Ley- " land & Co. Limited owned by Mr. Edmund Hoyle Vestey for " the purpose of a sale to the trustees of a settlement on the " basis that the purchase money should be payable over a long " period, say 125 years," and came to the conclusion that " it " would be fair and reasonable for the shares to be sold in " return for annual payments of £44,000 extending over 125 " years."

7. (a) The commissioners were of the opinion that the agreement was the only or principal or primary security for the

periodical payments therein referred to and they therefore assessed it by reference to the headings "Bond, covenant, or instrument "of any kind whatsoever (1)" and "Mortgage, bond, debenture, covenant," etc., in the First Schedule to the Stamp Act, 1891, and other relevant statutory provisions to duty at the rate of 5s. for each £100 of the total amount of £5,500,000 ultimately payable, viz., £13,750. The commissioners were also of the opinion that the agreement was not a "separate instrument" for the purpose of section 56 (4) of the Stamp Act, 1891.

(b) As to the transfer, the commissioners were of the opinion that it was chargeable by reference to the provisions of section 56 (2) of the Stamp Act, 1891, and that having regard to the provisions of the agreement and in particular clause 3 thereof the sum which might be payable during the period of 20 years next after the day of the date of that instrument was £5,500,000 and they, therefore, pursuant to section 56 (2) of the Stamp Act, 1891, assessed it to duty by reference to the heading "Conveyance or transfer on sale" in the First Schedule to that Act and other relevant statutory provisions at the rate of £1 for every £50 of £5,500,000, viz., £110,000.

8. The appellant company contended: (a) that the agreement was a "separate instrument" for the purpose of section 56 (4) of the Stamp Act, 1891, and was therefore chargeable with a duty of ten shillings only; (b) that according to the terms of sale the total amount which might be payable during the period of 20 years next after the day of the date of the transfer was £880,000 (20 × £44,000) and that duty at the rate of £1 per £50 by reference to the said heading "Conveyance or transfer on sale" should, pursuant to section 56 (2) of the Stamp Act, 1891, be assessed thereon making the duty properly chargeable on the transfer equal to the sum of £17,600 and no more.

Sir Andrew Clark Q.C. and *E. I. Goulding* for the Western United Co. Ltd. The stamp duty payable by the company on the agreement and transfer respectively is: (1) 10s. on the agreement, which is a "separate instrument" for the purpose of section 56 (4) of the Stamp Act, 1891; and (2) £17,600 on the transfer, which pursuant to section 56 (2) of the Act is chargeable with duty under the heading of "Conveyance or transfer on sale" at the rate of £1 for every £50 on £880,000 (namely, 20 × £44,000), the total amount which would become payable during the period of 20 years next after the date of the transfer.

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If the agreement did not constitute a "separate instrument" for the purpose of securing these periodical payments, the exemption in section 56 (4) could not be claimed, and it would not be arguable that it was not subject to ad valorem duty under the heading in the First Schedule, "Bond, covenant, or instrument "of any kind whatsoever," being the principal or primary security for sums of money payable at stated periods. This agreement, however, comes exactly within the scope of section 56 (4), being a provision for securing periodical payments on which ad valorem duty is chargeable.

It is not disputed that the transfer is subject to ad valorem duty as a conveyance or transfer on sale, and the only question is the amount. The consideration for the sale being payable by periodical payments, section 56 (2) is the relevant section and the duty is exigible on the sum which according to the terms of sale becomes due within the next 20 years: cf. *Reynolds* v. *Coleman* [3] on the force of the phrase "according to the terms." Twenty instalments of £44,000 was clearly what the parties intended should be paid during the next 20 years, and their intention is an element which the court has to consider: *Mortgage Insurance Corporation Ltd.* v. *Inland Revenue Commissioners* [4]; *Yeo* v. *Dawe*.[5]

The balance of £5,500,000 which would become payable if the company were in default on any instalment is not payable "according to the terms of sale," since it is a payment which only becomes due if there is default in payment of the agreed consideration. This case is distinguishable from *Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners*,[6] where it was held that agreed sums payable subject to a contingency came within section 56 (2), but that did not mean that a sum which only became payable if the terms of the contract of sale were broken was within the subsection.

Finally, money which "will or may" become payable means money of which there is a real possibility of its becoming payable, but default by the company on these instalments is so unlikely that the chance of a lump sum payment ever being made by it is de minimis, and such payment cannot be said to be money which "will or may" be payable within the meaning of section 56 (2): *Kenmare (Countess)* v. *Inland Revenue Commissioners*.[7]

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[3] (1887) 36 Ch.D. 453.

[4] (1888) 21 Q.B.D. 352; 4 T.L.R. 710.

[5] (1885) 1 T.L.R. 506.

[6] [1904] 2 K.B. 198; 20 T.L.R. 441; [1905] 1 K.B. 174; 21 T.L.R. 109; [1906] A.C. 21; 22 T.L.R. 160.

[7] [1957] 3 W.L.R. 461; [1957] 3 All E.R. 33.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. First, the agreement is not a "separate instrument" within the meaning of section 56 (4) of the Stamp Act, 1891, and the company cannot therefore claim the exemption to ad valorem duty in that subsection. The agreement must be taken to have been executed first, although no doubt one must look at both documents together. It is clear that the agreement constituted the primary or principal security for the money and was so treated by the parties. [Reference was made to *British-Italian Corporation* v. *Inland Revenue Commissioners* [8] and *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners*.[9]] So far as regards the exemption claimed under subsection (4) of section 56, the intention in that subsection is that where there is a conveyance on sale, the consideration for which is payable by periodical instalments which are themselves chargeable with ad valorem duty, and a "separate instrument" is executed securing those payments, that "separate instrument" is only charged with 10s. duty. The instrument to be a "separate instrument" must be executed contemporaneously with or subsequently to the conveyance on sale. The character of an instrument for the purposes of stamp duty must be ascertained when it comes into existence, and it cannot depend on another instrument executed subsequently. A separate instrument "made in that case" must mean "in a case" where a conveyance on sale "chargeable with "ad valorem duty in respect of any periodical payment" is already in existence. Here it is conceded that the agreement came first.

As to the transfer, *National Telephone Co.* v. *Inland Revenue Commissioners* [10] was relied on by the company in support of the contention that the transfer was only chargeable with ad valorem duty on the 20 instalments which the parties contemplated would be payable. But the cases go a great deal further than that and say that one must include and take into account in the words "money payable" money which may be contingently payable: *Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners*.[11]

[UPJOHN J. You say that "will or may" necessarily imports a contingency?]

Although the Master of the Rolls in the *Underground Electric Railways* case [11] did not rely on the word "may," he included money payable on a contingency. On that construction the

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[8] [1921] W.N. 220.

[9] 21 Q.B.D. 352.

[10] [1899] 1 Q.B. 250.

[11] [1906] A.C. 21.

Crown quite clearly can claim the maximum duty that might be payable on the conveyance or transfer, if that maximum can be ascertained from the terms of the sale. That the total of £5,500,000 might become payable under the terms of the sale appears from clause 3 of the agreement of sale. [*Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners* [12] before Channell J., the Court of Appeal and the House of Lords was referred to.] In that case the possible liability was a payment of £20,000 in one year and ad valorem duty was charged on that amount: see also *Underground Electric Railways Co. of London Ltd. and Glyn Mills, Currie & Co.* v. *Inland Revenue Commissioners*,[13] which was affirmed in *International Power and Paper Co. of Newfoundland* v. *Inland Revenue Commissioners*.[14]

It is not necessary to say whether or not clause 3 is likely or unlikely to come into effect. There is no reason to know whether this company can pay its debts or whether the annual payments will always be paid. It was said by Sir Andrew Clark that the likelihood of default was de minimis, but the argument de minimis is contrary to the cases: see *Kenmare* (*Countess*) v. *Inland Revenue Commissioners*.[15] To sum up on section 56 (2): that subsection only applies to a case where there is a 20 years' straight payment and nothing else; once that simple 20 years' period is departed from (such as in the present case, where a much larger sum might be payable under the terms of the sale), the provision for ad valorem duty limited to 20 instalments does not apply.

Sir Andrew Clark Q.C. in reply. With regard to stamp duty on the agreement as opposed to the transfer, *British-Italian Corporation* v. *Inland Revenue Commissioners* [16] is irrelevant on this point, except that an agreement for sale may be chargeable with ad valorem duty, but there was no dutiable conveyance in that case and there was no need to have one; it was nothing to do with section 56.

With regard to the argument that no instrument can be brought within section 56 (4) if it is executed before the conveyance, there is nothing in the section to that effect. The question is what was the nature of the transaction executed, and the nature of the agreement appears from the face of the document itself. Anyone reading it would say that it was perfectly clear that this was part of a transaction for the sale of shares in which the consideration was payment by instalments, and an agreement was to be found in a separate instrument giving security for the payment of those instalments.

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[12] [1904] 2 K.B. 198; [1905] 1 K.B. 174; [1906] A.C. 21.

[13] [1916] 1 K.B. 306.

[14] (1933) 12 A.T.C. 413.

[15] [1957] 3 W.L.R. 461.

[16] [1921] W.N. 220.

The duty on the transfer is governed by section 56 (2), and it cannot be assumed that this obligation is not going to be carried out according to the terms of the contract. Subsection (2) is a very special provision unlike any others, and the only direct decision on it is the *Underground Electric Railways* case.[17] The duty payable here is ad valorem on the consideration payable according to the terms of the sale, and the total sum of £5,500,000 is not a sum payable in the first 20 years according to the terms of the sale. The cases show that money payable periodically will include, for the purposes of ad valorem stamp duty, payments contingently payable, if that is according to the terms of the sale, but the provision in clause 3 is not part of the terms of the sale at all; it is merely a provision in the nature of a penalty. That payment is not a periodical payment and does not fall to be charged under section 56 (2).

It is accepted that the wording of the agreement cannot be altered by the intention of the parties; but it is material to consider what were the existing circumstances; here was an obviously substantial company, and although it was in everyone's mind that provision should be inserted in case of a default by the company, the likelihood of the purchasing company defaulting is really de minimis, and if it did default on an instalment it would be most unlikely to be able to pay the balance of the £5,500,000.

If the court holds that the company is entitled to a return of the balance of the stamp duty, it is entitled to interest on the amount which was so overpaid. The question turns on section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, under which a court of record may in proceedings for the recovery of a debt, if it thinks fit, award interest on the sum recovered. By section 24 of the Crown Proceedings Act, 1947, that was made to apply to the Crown. The question, therefore, is whether these are proceedings for the recovery of a debt and if repayment of this duty was a sum sued for in these proceedings: *In re McGreavcy.*[18] A remedy was given by statute for the recovery of this duty, which was a sum owing by the Crown, and it must accordingly be a debt within the meaning of section 3 of the Act of 1934.

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[17] [1906] A.C. 21.

[18] [1950] Ch. 269; 66 T.L.R. (Pt. 1) 389; [1950] 1 All E.R. 442.

Wilberforce Q.C. in reply on the question of interest. The company has no right to the return of the stamp duty until the court has decided that it is entitled to it. Section 64 of the Income Tax Act, 1952, is similar to section 13 of the Stamp Act, and provides that where a party is dissatisfied with an assessment, there must be a payment of the amount assessed before a case is stated, and provision is made for the repayment if the assessment is held to have been wrong. Interest is specifically provided for by section 64 (10) of the Act of 1952. That follows the provisions of the Act of 1918, and if interest were payable under the Law Reform (Miscellaneous Provisions) Act, 1934, it would not be necessary to put it in the Act of 1952.

[UPJOHN J. That argument is not impressive, because if it were in the Act of 1918, and left out of the Act of 1952, it would be said that interest was not now payable because it was left out.]

It is simply a question of the view that is taken of section 13 of the Stamp Act whether the procedure under it can be described as proceedings for the recovery of a debt. It contains a specific way of dealing with disputes relating to stamp duty, but it is not intended to include matters dealt with in the Law Reform (Miscellaneous Provisions) Act; no interest on such a claim has ever been awarded and this would be the first occasion if it were.

Cur. adv. vult.

December 20. UPJOHN J., having stated the facts, read the following judgment: The agreement and transfer both bore date of May 9 because at that time E. H. Vestey was in Australia and he found it convenient to execute both together. Sir Andrew Clark, for the appellant company, very fairly concedes, however, that the problem of stamping these documents must be approached upon the footing that the agreement was executed on May 9 and the transfer on or after the payment of the first instalment on June 1.

Those are the facts and I now turn to the issues of law. First, as to the proper stamp duty on the agreement.

The commissioners contend that the agreement ought to be stamped under the heading in the First Schedule to the Stamp Act, 1891, " Bond, covenant, or instrument of any kind whatso-" ever," and under paragraph (1) thereof, " Being the only or " principal or primary security for . . . any sum or sums of money "at stated periods." The duty under that heading would be 5s. per £100 on the total amount ultimately payable, i.e., £13,750.

It was at one time suggested by the appellant company that the agreement ought to be stamped under paragraph (2) of the heading as "a collateral or auxiliary or additional or substituted "security" with the fixed duty of 10s., but as it was plain that the only other document in the case was the transfer which was not (for the purposes of argument) in existence at the time and did not in any event operate as a security, that contention was abandoned in his reply by Sir Andrew.

It is clearly settled by at least two decisions of the Court of Appeal that the agreement, surprisingly enough, ought prima facie to be stamped as a security under the heading in the schedule which I have mentioned and that is not disputed. It is said, however, and this is the whole point on this part of the case, that the agreement is exempt under the provisions of section 56 (4) of the Stamp Act.

If that section does so operate, then it is clear from the terms of section 1 of the Stamp Act that it effectively overrules the provisions in the schedule.

[His Lordship read section 56 (4) of the Stamp Act, 1891.]

At first sight that seems to fit this case exactly. There is a conveyance on sale which admittedly must bear ad valorem duty, namely, the transfer, and there is a separate instrument, namely, the agreement, made for securing the payments.

Mr. Wilberforce, for the Crown, however, submits that the effect of the subsection is to exempt the agreement only if it comes into existence after the conveyance on sale. He places much reliance on the rather curious words in the subsection, "in that case." The scheme of the section is this, he submits: You may find provision for securing the payments in the conveyance on sale itself or you may find a conveyance on sale, and in that case, a separate instrument for securing payments. But you must, he submits, first find a conveyance on sale so that the security must be either contemporaneous or subsequent in point of time, and therefore, it being agreed that for the purposes of stamp duty the transfer is to be taken as dated on or after June 1, the conditions of the section are not satisfied.

He points out that if the agreement had been submitted for stamping on its date of execution the commissioners would not know whether in fact a conveyance on sale would be executed and, he submits, it would not be possible to say that the conditions of the section were satisfied.

Sir Andrew submits that you can look at all the circumstances and that the phrase "in that case" merely indicates that the subsection is to operate where the parties intend that the security is to be followed by a conveyance on sale.

Upon the whole, I have come to the conclusion that the submissions on behalf of the Crown are correct. In my judgment the exemption is to be granted only where you find first a conveyance on sale which is chargeable with duty, and in that document or in a separate contemporaneous or subsequent instrument a security; and it is not sufficient to find that the parties have executed a security, although they may be intending to execute a conveyance on sale hereafter.

This part of the appeal fails and I assess the duty at £13,750.

Secondly, as to the deed of transfer: No one doubts that this document has to be stamped ad valorem as a conveyance on sale, and as the consideration is payable by instalments the relevant provision is section 56 of the Stamp Act which is concerned, as the sidenote indicates, with periodical payments.

Subsection (1) is concerned with periodical payments for a definite period of less than 20 years and the total amount payable is taxed. Subsection (2) is in these terms: "Where the "consideration, or any part of the consideration, for a conveyance "on sale consists of money payable periodically for a definite "period exceeding twenty years or in perpetuity, or for any "indefinite period not terminable with life, the conveyance is to "be charged in respect of that consideration with ad valorem "duty on the total amount which will or may, according to the "terms of sale, be payable during the period of twenty years "next after the day of the date of the instrument."

Subsection (3) is concerned with payments during a life or lives and tax is paid on the instalments which may, according to the terms of sale, be payable during 12 years after the execution of the deed.

So in these cases the general policy of the legislature is to tax the instalments which may become due. It has been decided by the House of Lords in *Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners* [1] that money payable under section 56 includes money payable on a contingency, and Lord Lindley said [2]: "But the words of section 56 appear to "me to be wide enough to cover all moneys which may become

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[1] [1906] A.C. 21; 22 T.L.R. 160.

[2] [1906] A.C. 21, 23.

"payable and the latter part of clause 2"—that is clearly a reference to subsection (2)—"certainly favours this construction."

The appellant company says that duty should be levied in the terms of subsection (2) upon 20 instalments of £44,000, i.e., £17,600.

Upon this question the Crown, however, presents this attractively simple argument on the terms of subsection (2): You must look at the terms of sale and see what will or may, according to those terms, be payable in the first 20 years. One of the terms is clause 3. That "may" come into operation within the 20 years and thereupon the whole of the instalments will become payable. Accordingly, the whole number of instalments, aggregating £5,500,000, may become payable and ad valorem duty on that amounts to £110,000. The argument may be summarized thus: that in one contingency all the instalments may become payable; that is, if the contingency happens upon which clause 3 operates then there is an acceleration so that all the instalments may become payable within the 20 years.

I do not agree with that argument. Clause 3 is in a literal sense a term of the sale in that it is an undoubted term of the contract of sale. But it is a term of the contract which only comes into operation if the terms of sale be broken. The terms of sale for the purposes of section 56, in my judgment, are the terms of sale upon which the parties contemplate that the property will be paid for, i.e., 125 annual instalments of £44,000. The terms of sale do not, in my judgment, comprehend terms of the contract of sale which come into operation if, but only if, the agreed terms of sale are broken. You may call that a contingency; but I do not think that Lord Lindley, in the passage I have quoted, had in mind for one moment as a contingency, a provision of the contract that would only come into operation if the agreed terms of sale were broken.

It seems to me that the whole structure of section 56 negatives the literal construction placed upon it by the Crown.

Each of the first three subsections seems to me to proceed upon the footing that the contract is going to be carried out according to the primary intention of the parties. Instalments may be paid over a period less than 20 years (subsection (1)), over 20 years or an indefinite period (subsection (2)), or for a life or lives (subsection (3)). The Act contemplates that the payments will go on throughout the period, whatever it may be, in accordance with the tenor of the agreement, and will not be brought to a sudden end by a breach of the terms of sale agreed and the operation of some provision wisely inserted to deal with such an eventuality.

I allow the appeal on this part of the case. I assess the duty at £17,600 and order the return of the balance of £92,400, which has been paid.

The final question is whether I can order interest to be paid on the sum ordered to be repaid by the Crown. In contrast to the Income Tax Acts there is no provision for payment of interest contained in section 13 of the Stamp Act, and the claim is based on section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which by section 24 of the Crown Proceedings Act, 1947, binds the Crown. [His Lordship read section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.]

The real question is whether this sum can be described as a debt, and these proceedings as proceedings for recovery of a debt. That must depend on the true construction of section 13 (1) and (4) of the Stamp Act. [His Lordship read section 13 (1) and (4) of the Stamp Act, 1891.]

As a condition precedent to an appeal the appellant has to pay the duty and the document is stamped accordingly. In my judgment that gives rise to no relation of debtor and creditor at all. Of course, subsection (4) in justice to the subject makes provision for repayment where there has been an overpayment in complying with subsection (1), but that cannot affect the fact that the original payment was a payment of stamp duty. In my judgment the payment under section 13 cannot be brought in as a debt under the umbrella of the Law Reform (Miscellaneous Provisions) Act, 1934, nor can these proceedings properly be described as proceedings for recovery of a debt. Accordingly there is, in my judgment, no jurisdiction to order payment of interest.

Appeal allowed as to one issue and dismissed on the others.

Solicitors: *Charles H. Wright & Brown; Solicitor of Inland Revenue.*

I. G. R. M.

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Lord
Evershed M.R.,
Romer and
Ormerod L.JJ.

BERRY *v.* ST. MARYLEBONE BOROUGH COUNCIL.

[1956 B. 3765.]

Rates and Rating — "Religion" — Moral virtue — "Education" — "Social welfare"—Theosophical Society—Objects of society not wholly charitable — Written constitution — Whether activities relevant in ascertaining "main objects"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

The plaintiff, on behalf of the Theosophical Society in England, asked whether or not that society was, under section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, an organization ". . . which is not established or conducted for profit "and whose main objects are charitable or are otherwise concerned "with the advancement of religion, education or social welfare," and as such was an "organization" entitled to a measure of relief from rates. According to its rules the main objects of the society were: "(1) To form a nucleus of the Universal Brotherhood of "Humanity without distinction of race, creed, sex, caste or colour. "(2) To encourage the study of comparative religion, philosophy "and science. (3) To investigate unexplained laws of nature and "the powers latent in man":—

Held, (1) that having regard to the decision of the House of Lords in *Macaulay* v. *O'Donnell* [1943] Ch. 435n.—that the first of the above three objects of the society was not charitable—the society was precluded from contending that it was an organization "whose main object was charitable."

(2) That where an organization has a written constitution, it was to that alone that the court should normally resort to ascertain its objects for the purpose of section 8 of the Act of 1955, and evidence could not be received of what its activities had been in fact, either to construe the language by which its objects were described or to limit the proper construction of the language by reference to the activities, although, where an organization had several objects specified in its written constitution, its activities were relevant to an inquiry as to what should, for the purposes of section 8, be regarded as its main objects.

Dictum of Devlin J. in *Chartered Insurance Institute* v. *London Corporation* [1957] 1 W.L.R. 867, 875; [1957] 2 All E.R. 638 explained.

(3) That at least one of the main objects of the society was neither charitable nor otherwise concerned with the advancement of religion, education or social welfare, for the first object was concerned with none of these things within the meaning of the section—it was concerned with many other matters as well—and it followed that the society did not bring itself within section 8 of the Act of 1955.

United Grand Lodge of Ancient Free and Accepted Masons of England v. *Holborn Borough Council* [1957] 1 W.L.R. 1080; [1957]

3 All E.R. 281 and *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1957] 2 Q.B. 573; [1957] 3 All E.R. 199 applied.

Definition by Devlin J. of "education" in *Chartered Insurance Institute* case (supra) approved.

Decision of Wynn-Parry J. [1957] 1 W.L.R. 495; [1957] 1 All E.R. 681 affirmed.

APPEAL from Wynn-Parry J.[1]

The Theosophical Society in England (" the society ") through its general secretary, Mrs. Alice Lilian Berry (" the plaintiff "), brought this summons to determine whether or not the society was an organization within the provisions of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[2] and, accordingly, entitled to a measure of relief from liability for payment of the rates demanded by the Borough Council of St. Marylebone, the rating authority for the Borough of St. Marylebone (" the defendants ") in respect of its occupation of 50, Gloucester Place, London, W.1.

The objects of the society were stated in its constitution as follows: " (I) To form a nucleus of the Universal Brotherhood " of Humanity without distinction of race, creed, sex, caste or " colour. (II) To encourage the study of comparative religion, " philosophy and science. (III) To investigate unexplained laws " of nature and the powers latent in man."

The plaintiff in paragraph 5 of her affidavit in support of the summons explained the objects of the society as follows: " Theosophists explain the meaning of object (I) in paragraph 2 hereof " as follows: To form an ever-expanding group of persons who " are aware of the Universal Brotherhood of Man which is implied " by the Fatherhood of God and who believe in working for the " diminution and final abolition of all intolerance and discrimination relating to race, creed, sex, social class and colour."

Wynn-Parry J. held that the society was not an organization within section 8 (1) (*a*) of the Act of 1955.

The society appealed.

The objects of the society and the relevant facts are more fully set out in the judgment of the court.

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[1] [1957] 1 W.L.R. 495; [1957] 1 All E.R. 681.

[2] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: " (1) This section applies to . . .— " (*a*) any hereditament occupied for " the purposes of an organization . . . " which is not established or conducted " for profit and whose main objects " are charitable or are otherwise concerned with the advancement of " religion, education or social welfare " . . ."

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G. G. Honeyman Q.C. and *Dick Taverne* for the society, the plaintiff. Mrs. Berry, as secretary of the Theosophical Society in England, is appealing against the decision that the society is not an organization within section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, qualifying for rating relief. This is the case of a society concerned with the advancement of religion. There are two groups of trusts concerned with the advancement of religion which have failed to be recognized as charitable. There are, first, those cases in which it was held that the necessary public element was lacking, such as *Cocks* v. *Manners* [3] and *Gilmour* v. *Coats*,[4] and, secondly, those cases where it was held that the advancement of religion was not the sole object of the trust: *Farley* v. *Westminster Bank Ltd.*[5] and *Dunne* v. *Byrne*.[6] It was held by the House of Lords in *Macaulay* v. *O'Donnell* [7] that the first object of the society is not charitable. Accordingly, to bring itself within section 8 the society must show that its main objects are concerned with the advancement of religion or of education or of social welfare. The first object of the society is the advancement of religion. " Religion " is a word wide enough to cover the objects of this society; it covers a belief in an overriding power: *Thornton* v. *Howe*,[8] quoted in *In re Price*.[9] In considering the religious aspect of this matter, it must be remembered that the court is merely concerned to see whether the purposes of the society advance religion; it is not concerned with the spiritual merits of the religion so advanced. The decision in *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* [10] is distinguishable. The masons do not, but the theosophists do, hold active religious principles and have an extensive missionary side to their work. They advocate their own religious principles which they seek to spread. The masons, on the other hand, do not seek to convert anyone. [Reference was made to *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*.[11]]

The second matter in section 8 is the educational aspect. In *Chartered Insurance Institute* v. *London Corporation* [12] a new element was introduced by Devlin J., who said that each object should not be considered separately but the effect of all the objects taken together and that, if there was an ambiguity in an object clause, it was permissible to look at what the society in fact did. That principle should be borne in mind in determining whether this society's objects are within the section. It is not suggested that the main object of the society is the advancement of education, but there are elements of education in its objects.

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[3] (1871) L.R. 12 Eq. 574.

[4] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[5] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.

[6] [1912] A.C. 407; 28 T.L.R. 257.

[7] [1943] Ch. 435n.

[8] (1862) 31 Beav. 14.

[9] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

[10] [1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281.

[11] [1957] 2 Q.B. 573; [1957] 3 All E.R. 199.

[12] [1957] 1 W.L.R. 867; [1957] 2 All E.R. 638.

The third facet of the definition in section 8 is the advancement of social welfare. It is submitted that the objects of the society do fall within this head. [Reference was made to *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council* [13] and *Inland Revenue Commissioners* v. *Baddeley*.[14]]

Geoffrey Cross Q.C. and *John Arnold* for the defendants. The plaintiff's argument does not take sufficiently into account the fact that all institutions which are not profit making do not have objects beneficial to the community and are not entitled to relief. If a body claiming under section 8 has a written constitution, its objects must be ascertained from its constitution alone. It is not permissible to look at the actual activities of the body; those may vary from time to time. In income tax cases to claim relief a body must not only show that its objects are charitable but that its income is in fact applied for those objects. It is wrong to look at what the body in question has in fact done. On this point Lord Goddard C.J. and Byrne J. in *Chartered Insurance Institute* v. *London Corporation* [15] did not agree with Devlin J. In section 8 "religion" and "education" have the same meaning as in the charity cases. Parliament has not given these terms a different meaning; it has, however, by the addition of "social welfare" stressed the necessity for there being a public element. Having regard to the decision of the House of Lords in *Macaulay* v. *O'Donnell* [16] the objects cannot be exclusively for the advancement of religion or education or the House would have held them to be charitable. The objects are not concerned with the advancement of religion as those terms are used in the preamble to the Statute of Elizabeth I. That view is supported by the *Free Masons'* case.[17] It would be curious were it held that the object of the freemasons was not the advancement of religion but that of the theosophists was. No answer has been given to the question: what religion do the theosophists advance? They may have a religious object. They are not, however, concerned with the advancement of religion. With regard to the advancement of education, having regard to the observations of Lord Tomlin in *Macaulay* v. *O'Donnell*,[18] where he said that the objects of this society were not charitable, it is not open to the society to contend now that its object is the advancement of education, which is a charitable object.

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[13] [1957] 1 W.L.R. 941; [1957] 2 All E.R. 791.

[14] [1955] A.C. 572; [1955] 1 All E.R. 525.

[15] [1957] 1 W.L.R. 867; [1957] 2 All E.R. 638.

[16] [1943] Ch. 435n.

[17] [1957] 1 W.L.R. 1080.

With regard to the contention of the society that its objects are concerned with the advancement of social welfare, the *Skegness* case [19] shows that there must be a direct connexion between the benefit and the persons to be benefited. The fact that if the society's objects are achieved society will be benefited is not enough. There must be a direct benefit. The advancement of social welfare can be contrasted in this respect with the advancement of religion or education. The Miners' Welfare Act, 1952, shows the nature of social welfare: see sections 3 (1) and 13. Some of the objects of this society are not charitable, but political. Many persons hold differing views as to the desirability of the abolition of discrimination in regard to race, colour and sex. The production of a state of mind in regard to these questions is not the advancement of social welfare. There is no such direct benefit to the public as results from the advancement of religion or education. If that is wrong, the state of mind to be induced must be one which would commend itself to all reasonable people.

The court should incline against exemption from liability to rating and lean in favour of the general body of taxpayers. The advancement of social welfare cannot be equated to "beneficial "to the community."

John Arnold following. In construing the objects of the society, evidence of what the members consider the objects to be is not admissible, nor is it permissible to inquire what in fact are the activities of the society. If the court is satisfied that the words used to describe their objects are used in a special sense, evidence may be adduced as to the way in which the words were used by the society's founders, but not as to what the members now consider the words mean. [Reference was made to *Drummond* v. *Attorney-General for Ireland* [20] and *In re How*.[21]]

G. G. Honeyman Q.C. in reply. The court is entitled to

[18] [1943] Ch. 435n., 438.

[19] [1957] 2 Q.B. 573.

[20] (1849) 2 H.L.C. 837.

[21] [1930] 1 Ch. 66.

look at the acts of the society to see what its main objects are. Any ambiguity may be resolved by looking not merely at the surrounding circumstances but also at the conduct of the parties themselves: *Watcham* v. *Attorney-General of the East Africa Protectorate.*[22] The object of forming a "Nucleus of the Universal Brotherhood of Humanity" is in capital letters in the society's rules and the phrase is not to be read with its ordinary connotation. Evidence is admissible as to its special meaning. [*The Oxford Group* v. *Inland Revenue Commissioners*[23] was referred to.] Section 8 refers to the "main object." It is for the court to decide what is the society's main object by considering its activities and so to ascertain what it has in fact treated as its main object. The decision in *Inland Revenue Commissioners* v. *Baddeley*[24] was given before this Act became law.

Cur. adv. vult.

November 26. LORD EVERSHED M.R. I will ask Romer L.J. to read the judgment of the court.

ROMER L.J. This is an appeal from an order of Wynn-Parry J. in proceedings brought by the plaintiff, Mrs. Alice Lilian Berry, suing on behalf of the Theosophical Society in England (hereinafter referred to as "the society"), in which she sought a declaration that, upon the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society is an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. Had the application succeeded, the society would have become entitled to the rating relief which is provided by the section. By the order of the judge, however, it was declared that the society is not an organization falling within the section, and the plaintiff now appeals from that order.

The application was supported by an affidavit sworn by Mrs. Berry, who is the general secretary of the society and has been a member thereof since 1911. By that affidavit it is stated that the society is a component national society of the General Council of the Theosophical Society ("the International Society"). The affidavit further states as follows in paragraph 2: "The International Society . . . was founded in New York in 1875 and was

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[22] [1919] A.C. 533.

[23] (1949) 31 T.C. 221; [1949] 2 All E.R. 537.

[24] [1955] A.C. 572.

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"incorporated in India in 1905 under Act XXI of 1860 of the "Governor General of India entitled 'An Act for the Registration "'of Literary, Scientific and Charitable Societies, 1860.' The "headquarters of the International Society are at Adyar, Madras, "India. The objects of the International Society as set out in "its Memorandum of Association are as follows: '(I). To form "'a nucleus of the Universal Brotherhood of Humanity, with- "'out distinction of race, creed, sex, caste or colour. (II). To "'encourage the study of comparative religion, philosophy and "'science. (III). To investigate unexplained laws of nature "'and the powers latent in man'; and ancillary objects including "the maintenance of libraries.

"(3). The English Society . . . is an unincorporated society. "It was formed in 1888 and has as its object the promotion of "the objects of the International Society with special reference "to England. It is the occupier of the premises at 50, Gloucester "Place, London, W.1. The property of the society is held on "trust for its members by the English Theosophical Trust Limited ". . . which is a limited company incorporated under the Com- "panies Acts of 1908 and 1913. The chief sources of income of "the Society are subscriptions, donations and legacies. The "Society and the International Society are non-profit making "organizations and are run almost entirely by voluntary work. "The expenditure of the Society is confined to the promotion of "the objects of the International Society as set out in paragraph 2 "hereof."

The remainder of Mrs. Berry's affidavit deals with an explanation of theosophy and of what theosophists believe, the meaning which they attribute to their three main objects, and with the past and present activities of the society. [His Lordship read section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and continued:] The judge held that it was clear that the society is not established or conducted for profit and that its main objects are the three objects stated by Mrs. Berry in her affidavit. His decision that the society is not an organization within section 8 of the Act was founded on the view that the first of its objects is not charitable and is not "otherwise "concerned with the advancement of religion, education or social "welfare."

The three main objects of the society came up for consideration by the House of Lords in 1933 in *Macaulay* v. *O'Donnell*.[1] Under the will of a testatrix her residuary estate was given to the Folkestone Lodge of the society for purposes which, as the House held, involved a perpetuity; and the further question then arose whether the gift was saved from failure on the grounds that the objects of the society were charitable. The case is not reported, but the speeches of Lord Buckmaster and Lord Tomlin are printed as a footnote to *In re Price*.[2] The case had come before Clauson J. at first instance and a part of his judgment was referred to in the judgment of Cohen J. in *In re Price*.[2] Cohen J. expressed the view[3] that, in the opinion of Clauson J., the second and third objects of the society were valid and charitable purposes and that the observations of Lord Tomlin indicated that he did not dissent from this view. Both Lord Buckmaster and Lord Tomlin were clearly of the opinion that the first object of the society was not charitable and that, as it was separate from and independent of the other two objects, the gift was invalid. Lord Tomlin said[4]: "Whatever "may be said of the objects indicated in clauses (b) and (c), the "object covered by clause (a), read by itself, cannot, in my "opinion, be regarded as charitable." Then, after referring to an affidavit which had been filed on behalf of the society explaining the meaning of the word "nucleus" in the expression "to "form a nucleus of the Universal Brotherhood of Humanity," etc., Lord Tomlin proceeded: "I see no reason to think that "this statement (though its admissibility as evidence is open to "question) is not a fair and accurate statement of the purpose of "the clause, and the clause so regarded discloses, in my opinion, "no charitable objects at all. But it is said that the three clauses "should be read together, and so read should be construed so as "to confine the object of clause (a) to the formation of a body "devoted exclusively to carrying out the objects indicated in "clauses (b) and (c) respectively. I do not think the clauses can "be so read. Each clause, in my opinion, expresses a distinct "and independent object."

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[1] [1943] Ch. 435n.

It may well be, as Cohen J. said in *In re Price*,[5] that Clauson J.'s opinion that the second and third objects were charitable was undisturbed by anything which fell from Lord Buckmaster and Lord Tomlin. The second object is clearly charitable, but it appears to us that it is far from clear that the third object is also, and Mr. Cross was not prepared to concede that it was. Be that as it may (and we express no opinion in

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[2] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

[3] [1943] Ch. 422, 434.

[4] [1943] Ch. 435n., 438.

[5] [1943] Ch. 422.

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this judgment as to the third object in relation to section 8, for we heard no argument upon it), the decision of the House of Lords in *Macaulay* v. *O'Donnell* [6] with regard to the first object of the society precludes it from contending that it is "an organization . . . whose main objects are charitable"; nor did Mr. Honeyman, for the society, so contend before us. Accordingly, the society must rely upon other grounds in order to bring itself within section 8 of the Act. The way in which it seeks to do so is by contending that its first main object is either concerned with the advancement of religion, or of education, or of social welfare, or is concerned with the advancement of all three. In order to succeed on any part of this argument it is necessary, in our judgment, for the society to establish that (subject only to the principle de minimis) its main objects are exclusively concerned with the advancement of these three matters or with one or more of them; for, although an organization's subsidiary objects may be concerned with something else, section 8 does not apply, in our opinion, unless it be shown that its main objects are exclusively concerned with one or other of the specified purposes, or with all of them, as the case may be. On the other hand, the organization need not, in our judgment, prove that its objects, when carried into effect, do in fact advance religion, etc., for it is sufficient to show that, being directed to that end, they may have that result: *In re Price*,[7] following *Thornton* v. *Howe*.[8]

Before considering the society's arguments in further detail, it would be convenient at this point to examine the question of the relevance and admissibility of paragraphs 4 et seq. of Mrs. Berry's affidavit. These paragraphs are in part devoted to an explanation of what theosophy is, and of the meaning which theosophists attribute to the three main objects, and in part to a survey of what the International Society and the English Society have actually done. In our opinion, when an organization or body has a written constitution, it is to that and to that alone to which the court should normally resort in order to ascertain its objects for the purpose of section 8 of the Act; and, as Lord Buckmaster pointed out in *Macaulay* v. *O'Donnell*,[9] unless an English word or phrase has, in relation to the organization, a special meaning, evidence as to its meaning is not properly admissible. The House of Lords did not formally reject the affidavit which had been filed in *Macaulay* v. *O'Donnell* [9] explaining the word "nucleus" in the society's first object, and we are willing

[6] [1943] Ch. 435n.
[7] [1943] Ch. 422.
[8] (1862) 31 Beav. 14.
[9] [1943] Ch. 435n.

to take note of what theosophy is and what theosophists believe, as stated by Mrs. Berry in her affidavit. It would, however, be going too far, in our opinion, to accept as admissible (in so far as it is directed to the question of construction) evidence of how theosophists explain the meaning of their objects. (Compare, for example, paragraph 5 of the affidavit, hereinafter mentioned.) The interpretation of the objects is a matter for the court and not for the members of the society.

There remains Mrs. Berry's account of the activities in which the society and its parent body have been engaged. Mr. Honeyman submitted before us that it is legitimate to look not only to the language in which the society's main object is framed but also to what the society has actually done; and if, as he contended, the whole of its proved activities are confined to those specified in section 8, its objects also ought to be regarded as so confined. He relied, in support of this suggestion, on the judgment of Devlin J. in *Chartered Insurance Institute* v. *London Corporation.*[10] In that case the institute claimed the benefit of section 8 of the Act in respect of its occupation of certain premises on the ground that its main objects were concerned with the advancement of education. The Divisional Court (Lord Goddard C.J., Byrne and Devlin JJ.) held that education was not the main object of the institute and that, accordingly, it was not entitled to relief; but the judges followed somewhat different routes in arriving at that conclusion. The objects and purposes of the institute were set out in paragraph 2 of its charter and amounted to a considerable number.

The Lord Chief Justice, in the course of his judgment, said [11]: "To my mind, and the ground on which I propose to base my "judgment, the question depends on the interpretation of the "charter, to which we have to look to find the main objects of "the institute, because it is a chartered body with a charter "granted by the Sovereign, and its objects are set out." He then proceeded to consider several of the purposes specified in the charter and to examine whether each one was concerned, and, if so, to what extent, with the advancement of education. Having done so, the Lord Chief Justice summarized the result by saying [12]: "I think that . . . the main object of this institute "is to benefit the profession of insurance generally. . . . The "object . . . is generally to raise the status and dignity of the

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[10] [1957] 1 W.L.R. 867; [1957] 2 All E.R. 638.

[11] [1957] 1 W.L.R. 867, 872.

[12] Ibid. 874.

"profession," which, in his view, and notwithstanding the teaching and examinations which were involved, did not amount to education for the purposes of section 8.

Byrne J. agreed with the Lord Chief Justice, saying that, upon an examination of the charter, it appeared to him to be quite plain that the main objects of the institute were more concerned with the advancement of members of the profession or occupation of insurance.

Devlin J. said[13]: "I have come to the same conclusion, but "by a slightly different route, in which I place rather less "reliance on the terms of the charter and more on the findings "of fact in the case. I agree that since what we have to ascertain under section 8 is whether this is a hereditament which "is occupied for the purposes of an organization whose main "object is concerned with the advancement of education, the "natural place to look in the first instance in order to see what "are the objects of the institute is the charter. . . . But in "considering what the main object is I do not think one can "necessarily, as it were, count the different objects in the charter "and see how many point one way to the advancement of "education and how many point to such extraneous matters as "disciplinary powers, the assistance of necessitous members, and "so on. I think that in considering what the main object is one "must have regard to the way in which those objects have "actually been achieved or attempted, and that is to be ascertained from the evidence that is set out in the case." The judge then observed that it was stated in the case that some 80 per cent. of the work of the institute was devoted to tuition and examination activities rather than to the other matters which were set out in the later paragraphs of the charter; but he agreed with the Lord Chief Justice and Byrne J. in thinking that that was not education of the kind which was envisaged by section 8.

We do not think that the judgment of Devlin J. at all assists Mr. Honeyman's contention that the interpretation of the society's objects can be assisted by resort to the operations in which it has indulged. In our opinion, Devlin J. was saying no more than that, when an organization has several objects specified in its written constitution, as was the case with the Chartered Insurance Institute, its activities are relevant to an inquiry as to what should, for the purposes of section 8, be regarded as its main objects. We do not think that the judge was intending to go further than that and, if such was his view, we cannot see that it is open to any criticism. That, however, is a very different thing from saying that, where there is no doubt as to what the main objects of a body are (and there is no doubt in the present case), evidence may be received of what its activities have been either in order to construe the language by which the objects are described or to limit the proper construction of the language by reference to the activities. In our judgment, no such evidence is admissible for either of those purposes.

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[13] [1957] 1 W.L.R. 867, 875.

Having regard, then, to the language of the first of the society's objects, and not disregarding Mrs. Berry's explanation of what theosophy is and what theosophists believe, the question arises whether that object is, in whole or in part, concerned with the advancement of religion. That it is not wholly so concerned would seem to follow from the decision of the House of Lords in *Macaulay* v. *O'Donnell* [14]; for a purpose which is solely concerned with the advancement of religion could hardly fail to be charitable, which the House held that object No. 1 was not. If it be objected that the words "or otherwise" in section 8 show that some private aspect of religion was in contemplation, we agree with the judge in thinking that no question of any such private element is shown in the present case. Is, then, the object concerned in part with the advancement of religion? So far as material to this question, the first object reads: "To form a nucleus of the "Universal Brotherhood of Humanity without distinction of "creed." In paragraph 4 of her affidavit Mrs. Berry says: "Theosophy is the study of the truths which form the basis of all "religions and which cannot be claimed as the exclusive posses-"sion of any one religion. Theosophists believe that the divine "life of God is the source of, is present in and progressively "manifests itself in all the kingdoms of nature and the super-"natural kingdoms. Theosophy as a religion teaches the "Fatherhood of God and the recognition of the corresponding "Brotherhood of Humanity; as a philosophy it teaches how the "divine life of God progressively manifests itself; and as a science "it teaches how this process occurs, the laws which govern it, "and how human beings can hasten it."

In the recent case of *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council*,[15] Donovan J., in delivering the judgment of the Divisional Court, said [16]: "To advance religion means to promote it, to spread its "message ever wider among mankind; to take some positive steps

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[14] [1943] Ch. 435n.

[15] [1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281.

[16] [1957] 1 W.L.R. 1080, 1090.

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" to sustain and increase religious belief; and these things are " done in a variety of ways which may be comprehensively " described as pastoral and missionary. There is nothing comparable to that in masonry. . . . There is no religious instruction, no programme for the persuasion of unbelievers, no " religious supervision to see that its members remain active " and constant in the various religions they may profess, no " holding of religious services, no pastoral or missionary work of " any kind."

What the Divisional Court said of masonry can substantially, if not equally, be said, so far as we can see, of theosophy. But, further than that, the teaching of the Fatherhood of God and the recognition of the corresponding Brotherhood of Humanity, without distinction of creed, appears to us to be at best the teaching of a doctrine, which is of a philosophical or metaphysical conception, rather than the advancement of religion. If the society is concerned in the advancement of religion it may well be asked, " What religion does the society advance and how does it advance " it? " We can find no satisfactory answer to this question in the language of the first object or in any of the relevant evidence. In our opinion, it cannot be said that this object is in any way concerned with the advancement of religion.

Nor can we find that the object is in any way concerned with the advancement of education. In the course of his judgment in the *Chartered Insurance Institute* case[17] above referred to, Devlin J. said: " I think that the advancement of education " means the advancement of education for its own sake in order " that the mind may be trained. It may be that it is unnecessary that that should be general education—I accept for the " purposes of the present case that education in a particular " subject is sufficient—but the main object must be the advancement of education in the sense of the training of the mind." We agree with those observations of the judge. The only teaching which, on the material before us, is involved in the first of the society's objects is the teaching of the theosophical doctrine itself; and that cannot, in our judgment, be regarded as education in the sense to which Devlin J. referred.

If, then, the society is unable to show that its first object is concerned with the advancement of religion or education, it can only succeed in this appeal if it establishes that such object is wholly concerned with the advancement of social welfare. This aspect of section 8 was considered by this court in *National*

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[17] [1957] 1 W.L.R. 867, 875.

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Deposit Friendly Society Trustees v. *Skegness Urban District Council.*[18] The facts of that case had little in common with those in the present case and it is unnecessary therefore to state them. Certain points do, however, emerge from the judgment of the court: (1) Prima facie, the expression " social welfare " means the well-being (whether in the physical, mental or material sense) of individuals as members of society. (2) The provision of benefits which tends directly to improve the health or conditions of life of individuals comes prima facie within the expression " social welfare." (3) The expression does not necessarily involve the presence of an eleemosynary element. (4) In order to qualify under this part of the section, an organization must have as its object the advancement of social welfare as an end in itself or for its own sake; and, although " concerned " is a wide word, it cannot be read as bringing in as an object something which is incidental. (5) The persons to be benefited and the source of the benefits are pertinent considerations. (6) Inasmuch as the provision in question is an exemption from rates at the expense of the general body of ratepayers, it would be right, in a doubtful case, to give the words " or otherwise concerned with the advancement of social welfare " a restricted meaning.

It is quite clear that the court was not attempting an exhaustive or precise definition of these words. It was indicating in a general way what, in its view, they mean and prescribing tests which might usefully be applied to the facts of any given case. The reference in the judgment to welfare denoting a state of " being well, whether in the physical, mental or material " sense " was not intended necessarily to exclude the idea of well-being in a spiritual or emotional sense, for example, happiness or ethical behaviour. Nor did the court, in our judgment, when referring to " the provision of benefits which " tends directly to improve the health or conditions of life of " individuals " mean that the provision of benefits, which tended indirectly to produce those results, cannot qualify under the section; for example, it might well be that an organization, the main object of which was concerned with the free training of girls who desired to take up nursing or midwifery as a profession, would qualify, notwithstanding that there was no direct benefit to society during their period of training. We venture to make these observations because a somewhat too rigid approach to the judgment in the *National Deposit Friendly Society* case [18] seemed to be manifested in some of the arguments which were addressed to us.

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[18] [1957] 2 Q.B. 573; [1957] 3 All E.R. 199.

Turning now to the first object of the Theosophical Society, one is struck not only by its width, but also by its vagueness and uncertainty, even when read in the light of Mrs. Berry's affidavit. In order to enable the society to succeed, it would, in effect, be necessary to construe the relevant words in section 8 as including any non-charitable body which benefits the community, or a part of it, in any way, and it is clear, both from the language of the section itself and from the judgment of this court to which we have referred, that the words cannot be so construed. The implementation of the belief (referred to in paragraph 5 of Mrs. Berry's affidavit) "in working for the diminution and final "abolition of all intolerance and discrimination in relation to "race, creed, sex, social class and colour" is clearly within the scope of the society's first object. Equally clearly some at least of those activities are far removed from any conception of "social welfare" that can reasonably or legitimately be entertained. It is not enough for the society to establish that in some, or even in many, ways certain members of the community may be benefited, directly or indirectly, by the practice and propagation of its ideology. Even assuming that that is so (and we express no opinion about it, one way or the other) the scope of the society's first object is so wide that many activities lie within it which do not promote the welfare of the community in a social sense at all. In dealing with this part of the case Wynn-Parry J. said [19] that object No. 1 "would justify operations which could "not by any stretch of the imagination be considered as within "the phrase 'social welfare,' however wide a construction were "reasonably placed upon that phrase." In that view we respectfully and entirely concur.

The conclusion, accordingly, at which we have arrived is that at least one of the main objects of the society is neither charitable nor otherwise concerned with the advancement of religion, education or social welfare, for it is concerned also with many other matters as well. From this it follows that the society does not bring itself within section 8 of the Act and that the plaintiff's appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon for Berry & Berry, Tunbridge Wells; Sharpe, Pritchard & Co.*

B. A. B.

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[19] [1957] 1 W.L.R. 495, 498.

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE BOROUGH COUNCIL.

[1957 G. 629.]

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Nov. 11, 26.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Rates and Rating—Social welfare—Health—Council required by statute to maintain register of nurses—Claim for rating relief—Advancement of " social welfare "—Meaning—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

An organization regulated by the Nurses Act, 1957, which was required by that Act (inter alia) to maintain a register of nurses established in pursuance of the Nurses Registration Act, 1919, claimed in respect of premises occupied by it for the purposes of its statutory functions the benefit of the rating relief afforded by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to organizations " not . . . conducted for profit " and whose main objects are charitable or are otherwise concerned " with the advancement of religion, education or social welfare " within section 8 (1) (*a*):—

Held, (1) that the organization's main objects were not " con-" cerned with the advancement of . . . social welfare " and it was not within the scope of the relieving provision.

(2) That the intended results of maintaining the register of nurses were the enhancement of the status of nurses and nursing and, inseparably connected with that, the benefit and protection of the public when sick; it could not be said that the benefit to the profession was merely ancillary to the benefit to the public.

General Medical Council v. *Inland Revenue Commissioners* (1928) 44 T.L.R. 439; 13 T.C. 819 and *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* (1929) 14 T.C. 645 followed.

(3) That " social welfare," in the context of subsection (1) (*a*) of section 8, which had the effect of transferring the burden of rates from the organizations within its scope to other sections of the general public, and having regard to the preceding words " advance-" ment . . . of education," was to be construed in a limited sense and did not embrace everything done for the benefit of the public; the expression " concerned with the advancement of social welfare " was not synonymous with " established for benefiting the public," but involved, at any rate, the concept of fulfilling social obligations towards those in the community whose living conditions in the relevant sense were inadequate; further, to come within the provision it was necessary to show that the objects were essentially directed to the advancement of social welfare, not merely related to it.

Inland Revenue Commissioners v. *Baddeley* [1955] A.C. 572; [1955] 1 All E.R. 525; 35 T.C. 661 distinguished.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1957] 2 Q.B. 573; [1957] 3 All E.R. 199 applied.

Decision of Danckwerts J. [1957] 1 W.L.R. 941; [1957] 2 All E.R. 791 reversed.

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GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE BOROUGH COUNCIL.

APPEAL from Danckwerts J.

The General Nursing Council for England and Wales took out a summons against the St. Marylebone Borough Council (hereinafter called the rating authority) to determine whether on the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, they formed an organization within the scope of that subsection and were, therefore, entitled to the rating relief afforded by subsection (2) in respect of a hereditament at Nos. 23 to 25, Portland Place, occupied by the council for the purposes of its statutory functions under the Nurses Act, 1957.

Danckwerts J. declared that the organization, having been established to ensure that the general public should receive the services of competent nurses, was for the benefit of the public and, therefore, for a purpose of social welfare, within the meaning of section 8 (1) (*a*) of the Act of 1955.

The rating authority appealed.

Geoffrey Cross Q.C. and *J. L. Arnold* for the defendants, the rating authority. The sole question is whether the objects of this non-profit-making organization are " concerned with the advancement of social welfare," for having regard to the analogous decision of *General Medical Council* v. *Inland Revenue Commissioners*,[1] followed in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[2] it cannot be contended that any other head of relief applies.

The intended effect of maintaining the statutory register was to enhance the status of nursing as a profession. No doubt the public benefited too, but it does not follow that because the public derive benefit the council is a body concerned mainly with social welfare, any more than, for example, the Bar Council would be, or any other body the achievement of whose main objects incidentally benefits the public. On the other side of the line would be, for example, a legal advice bureau, or, closer to the present case, a District Nursing Organization, which might well be held to be for the advancement of social welfare. In such cases there would be a direct contact between the facility and the public. The benefit to the public afforded by bodies such as the General Medical Council, the Bar Council or the Nursing Council is too indirect.

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[1] (1928) 44 T.L.R. 439; 13 T.C. 819.

[2] (1929) 14 T.C. 645.

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[Lord Evershed M.R. The Bar Council does not seem at first sight to be quite analogous. One feels instinctively that a profession such as this, dealing with people under a disability, should be treated differently. Litigants are not on quite the same footing.]

There must be direct contact between the beneficiary and the hand giving the welfare.

[Lord Evershed M.R. Would a statutory organization of probation officers be within this?]

Not if the organization was concerned primarily with raising the standard of the officers concerned. This is a statutory body and it would be strange if Parliament has established a body which does not benefit the public; but it is not sufficient to show that the main object is to benefit the public. Public benefit is not synonymous with the advancement of social welfare. It cannot make any difference for rating purposes whether the organization is statutory or whether a profession sets up its own disciplinary body. In the present case the benefit to the public and the benefit to the nurses themselves are inseparably connected, but to come within the relieving provision it has to be shown that the main object is wholly connected with the advancement of social welfare. The main object of this body is to maintain the register. *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[3] shows that some limitation must be put on the wide and vague meaning that "social welfare" might otherwise bear. Social welfare is a term of art and involves the provision of some immediate benefit to the person in question: see the use in the Miners' Welfare Act, 1952. In the Act of 1955 Parliament had in mind social welfare services. It is not, of course, suggested that these are not for the benefit of the public. Nor can it be denied that the provision of health services would be advancing social welfare, but here the provision is too remote and the council is not in any case "wholly" concerned with that end. The intended effect of maintaining the register was to raise the status and improve the conditions of those following the profession of nursing.

In the *General Medical Council*[4] and the *General Nursing Council for Scotland*[5] cases the court was concerned with whether the bodies were established for charitable objects only. Here the question is whether they are for social welfare only. The objects of the Medical Council were comparable with those of the Nursing

[3] [1957] 2 Q.B. 573; [1957] 3 All E.R. 199.

[4] 44 T.L.R. 439.

[5] 14 T.C. 645.

Council. There the professional benefit was held to be paramount, but it would not have been sufficient even if the interests had been equally important. The *General Medical Council* case [6] cannot be validly distinguished on the ground that the benefits afforded to registered doctors included the important one of enabling them to sue for their fees (which unregistered doctors could not do) for, although there is no such advantage afforded by being a State registered nurse, neither is there any corresponding prohibition against the unregistered nurse suing for her payment.

The main object of this council is keeping the register, and that object is not, as it must be if the council is to qualify for relief, "wholly" for the advancement of social welfare. It is not sufficient to show that the main object is partly concerned with social welfare or that one of the main objects is wholly so concerned.

[LORD EVERSHED M.R. The section requires that the body shall be concerned with the "advancement" of social welfare, not merely concerned with it. Thus, although nursing in the health service is part of social welfare, it does not follow that maintaining the register is advancing that social welfare.]

Anything tending to enhance the value of the social welfare service is advancing social welfare. This body is not entirely concerned with social welfare but substantially with professional advancement.

J. L. Arnold following. The distinction which it is sought to draw is between the sort of body which in relation to a particular vocation is concerned with regulating the profession as such—an educational or disciplinary body—and the quite different kind which is directly concerned with providing facilities for the public concerned. It has been suggested that the profession with which the Nursing Council is dealing is more directly concerned with relieving disability than, for example, the Bar Council. Examination of marginal cases shows that this distinction is unreal. Advice on choosing a good advocate may, for example, have more of the element of meeting need than the provision of nurses for cosmetic surgery. Nor can one draw a distinction including statutory and excluding non-statutory bodies. If that were a sound basis of distinction, the Law Society would fall in one category and the Bar Council in the other. It is a necessary implication of any activity enabled by a Public General Act that it would be one tending to promote usefulness to the public. In *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*[7] Lord Sands drew attention[8] to the activities of the Inland Revenue Commissioners—it would be a surprising thing if they were found to be engaged in activities of social welfare, but the construction favoured by Danckwerts J. would seem to lead to that result. It is clear that social welfare must be limited at least to the extent that the references to religion and education are not otiose. Plainly bodies concerned with these ends would be of the greatest public utility. In *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[9] the court started off with the intention of giving an exhaustive definition of social welfare, and Parker L.J. nowhere said that it was not intended to be exhaustive. For other guidance and the scope of the expression one can only rely on common usage. A doctor, nurse or dentist working exclusively, for example, in a public clinic probably would be engaged in social welfare work as a "welfare worker" in the popular sense, but it could not be said of all doctors, nurses and dentists that all their work was of that character. Evidence of common usage is provided by the Mining Industry Act, 1920, which established a fund which by the Mining Industry Fund Act, 1925, came to be known as the welfare fund. The "social welfare" part of that welfare fund was used to provide amenities such as pit head baths and clinics which were of direct usefulness to that mining community. Common usage preserves the directness of which Parker L.J. spoke in the *National Deposit Friendly Society* case.[9]

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[6] 44 T.L.R. 439.

G. D. Squibb Q.C. and *W. L. Roots* for the plaintiffs, the Nursing Council. The first question is whether one can say that the main object is concerned (not necessarily "wholly" or "exclusively") with the advancement of the proper nursing of the sick, and, secondly, whether the proper nursing of the sick is social welfare (it is not necessary, of course, that it should be charitable). The objects of this body have to be ascertained from the statutes under which it was set up. The Nurses Act does not express any objects; it merely confers powers and says what the body does. It is left to the courts to infer what the object is. The effect of keeping the register is unquestionably to bring about the following two results, first, that the sick are better nursed, and, secondly, that the status of nursing is raised. Following what Lord Sands said in *General Nursing Council for*

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[7] 14 T.C. 645.

[8] Ibid. 652.

[9] [1957] 2 Q.B. 573, 581.

Scotland v. *Inland Revenue Commissioners*,[10] the second result must be considered as incidental to the first. Parliament was trying to secure that the sick should be properly nursed by properly qualified people. Probably most social welfare activities result in some incidental advantages to the practitioners. The probation service is unquestionably a form of social welfare, but it also incidentally gives the probation officers a livelihood.

The section does not require that the main object should be "wholly" concerned with the advancement of social welfare. Alternatively, if the proper inference from what the council does is that the main object was partly concerned to improve the status of nursing the sick and partly to raise the standard of the profession, that would still be within the section. The object can conceivably be concerned with two ends, and although it may be impossible to say which is the more important, it is still correct to say that the object is "concerned" with (that is, "somehow mixed up with in any way") social welfare, and, provided that the end of social welfare is not merely incidental to the other, the section would apply. Here it is the benefit which accrues to the nurses which is the incidental result of the statutory operations of the council.

[Lord Evershed M.R. In the *General Medical Council* case[11] the court was considering whether the council was a charitable body and charitable *only*.]

There were further distinguishing features, such as the inability of unregistered doctors to sue for their fees and the prohibition against partnerships between registered and unregistered practitioners. Here the nurses get no concrete advantages from registration, except that competition from unregistered nurses is limited. The doctors got direct benefits under the Medical Acts but the advantages to the nurses are only indirect. If the Nursing Council were held to be within the provision it would not necessarily follow that the General Medical Council would also be within it. Lord Sands[12] puts the matter succinctly in the passage cited by Danckwerts J.

The second question is whether nursing the sick is a form of social welfare. The courts have avoided an exhaustive definition of what is social welfare, and there is not much divergence between the view put by Mr. Cross and that submitted for the council on this point. There must be some benefit to individuals. In the Public Health Acts and the Guardianship of Infants Act welfare is directed to human beings as human individuals, not as an amorphous mass, and Danckwerts J. must not be taken as having said otherwise. The submission on this point by Mr. Cross before Wynn-Parry J. in *Berry* v. *St. Marylebone Borough Council*,[13] and adopted whether consciously or unconsciously in the *National Deposit Friendly Society* case,[14] is attractive, and that is also the usage in the Mining Industry Acts.

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[10] 14 T.C. 645.

[11] 44 T.L.R. 439.

[12] 14 T.C. 645, 652.

The Nursing Council is looking after the sick and is fairly within the State welfare services. Anything directly concerned with human beings as serving the sick comes under the heading of social welfare just as much as looking after old people, etc. It is unnecessary to say that social welfare should be equated with benefit of the public.

The major part of the country is provided with a nursing service. The council is concerned with advancing that service. There is no valid distinction between an eleemosynary service and one which has to be paid for. A service does not have to be free in order to be for social welfare. There may be exceptional cases, but the council is dealing with the nursing of the sick in general and that is plainly a form of social welfare. Providing legal advice can be said to be social welfare, but it does not follow that all giving of legal advice is that. Much time is spent by lawyers in giving advice to bodies corporate. Nursing, on the other hand, is concerned with human beings as such.

W. L. Roots following. In the cases concerned with insurance bodies or chartered secretaries the constitutions of the bodies make it plain that the objects are concerned with raising the status of the members. In some cases there are professional bodies already established which are then given statutory powers to enforce their qualifications; that again does not alter the character of the bodies concerned. But here the court is not dealing with a professional body of that sort, but with one which is specifically set up for a very limited purpose. It cannot be described as having either quasi-trade union functions or fee-getting functions and, when regard is had to the Act, the benefit to the individual nurses is very limited. There are certain nursing jobs for which a fully trained nurse is needed, but there is no reason to suppose that a State registered nurse would get better conditions of work than an unqualified secretary nurse. There is nothing in this Act which in any way enables or shows that

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[13] [1957] 1 W.L.R. 495; [1957] 1 All E.R. 681; affirmed ante, p. 406.

[14] [1957] 2 Q.B. 573.

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prima facie a State registered nurse obtains any pecuniary advantages. The real object of the Act is to enable people to know that a nurse has reached a sufficient standard to enable her to take a certain quality of work. It is inconceivable that Parliament should not have realized that the words "social welfare" are capable of extremely wide meaning and it is submitted that they were chosen with the deliberate intention of making a wide exemption.

Geoffrey Cross Q.C. in reply. If the main object is directed to something other than social welfare apart from insignificant side effects, then exemption cannot be claimed. "Concerned "with" means more than "somehow mixed up with." There is no distinction between doctors and nurses for this purpose. Both get direct benefit from the legislation regulating their professions.

Cur. adv. vult.

Nov. 26. Lord Evershed M.R. The judgment which I am about to read is the judgment of the court.

In this case (which, like the immediately preceding case,[1] arises upon an application by originating summons to the Chancery Division of the High Court) the General Nursing Council for England and Wales seeks and has obtained a declaration that it is an organization such as is mentioned in section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and is, accordingly, entitled to the benefit of that section in respect of the hereditament occupied by it for the purposes of its statutory functions at Nos. 23 to 25, Portland Place in London. In this case, as in the last,[1] it is not in doubt that the council is an organization not established or conducted for profit. But, having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Commissioners*,[2] and to the decision of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[3] it has not been contended before us that the council can be regarded (at any rate in this court) as an organization whose main objects are charitable, or as an organization whose main objects are otherwise concerned with the advancement of education. The sole question is whether the council is, within the meaning of the section, an organization whose main objects, not being charitable,

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[1] *Berry* v. *St. Marylebone Borough Council*, ante, p. 406.

[2] (1928) 44 T.L.R. 439; 13 T.C. 819.

[3] (1929) 14 T.C. 645.

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are "concerned with the advancement of social welfare." Danckwerts J. came to the conclusion that it was. The council, he said[4]: " . . . was not established, as it seems to me, for the "purpose of raising the professional status of the nurses, but for "the purpose of creating a system of registration so as to prevent "incompetent nurses being able to victimize the public, and for "making sure that the public should receive the services only of "competent nurses. That seems to me to be the establishment "of a body for benefiting the public, and, therefore, for a purpose, "as it seems to me, of social welfare."

Though the council was first established by an Act of Parliament of the year 1919, it was agreed before us, as before Danckwerts J., that the Nurses Act, 1957, (which, inter alia, repealed and re-enacted the earlier statute) could be taken as accurately specifying and containing the purposes and functions laid by Parliament upon the council. From this source, therefore, must be discovered (with the guidance to be obtained from the two cases already mentioned of the *General Medical Council*[5] and the *General Nursing Council for Scotland*[6]) the answer to the first essential question: What are the "main objects" of the council? Danckwerts J. has summarized in his judgment all the provisions of the Act of 1957, and we do not need to repeat them in detail. It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and duties as are ancillary to and consequent upon the foregoing. The income of the council appears to be in part derived from fees which the council are authorized to charge upon applications for examination and registration or enrolment and the like, and as to the rest from moneys directly or indirectly provided by Parliament. Our attention was not, during the argument, directed to any figures showing the actual income or expenditure in any year of the council, from which we assume that such figures do not assist towards a solution of the problem before the court. It should be added that, by the terms of the Act, only those persons whose names are upon the council's register are entitled to call themselves "nurses," or to wear the appropriate and distinctive uniform of nurses.

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[4] [1957] 1 W.L.R. 941, 946.

[5] 44 T.L.R. 439.

[6] 14 T.C. 645.

In the first of the above two cases it was, of course, necessary for the General Medical Council, in order to succeed, to show that it was established "for charitable purposes only"; and that (in the view of this court) in spite of the educational and benevolent character of many of its purposes, it could not succeed in doing. The judgment of Lord Hanworth M.R. was, we think, less positive in this respect, but there is no doubt that both Sargant and Lawrence L.JJ. were clearly of opinion that the real scheme and purpose of the relevant legislation[7] "is to "regulate the profession of medical men, who, in consequence, "have certain privileges conferred upon them by the legislation, "and that it is in the first instance as a professional measure "that the legislation is to be regarded." Thus, in the view of the majority (at any rate) of the court, the public benefit and advantage, which unquestionably resulted from the regulation of the medical profession, should be regarded as of secondary significance.

When the case of the General Nursing Council for Scotland came before the Court of Session, there is no doubt that the judges were more sympathetic to that body than had been the English Court of Appeal to the General Medical Council; and it was and is a point of distinction between the Medical Council, on the one hand, and the two Nursing Councils on the other, that in the former case material benefits are conferred by registration exceeding anything to be found in the cases of the Nursing Councils—particularly the provision that only registered doctors can sue for and recover their fees. Nevertheless, the Inner House concluded in the end that the case before them could not be satisfactorily distinguished from that of the General Medical Council. In the course of his leading judgment, Lord Sands said[8]: "The sole purpose of the council is to form and maintain "a register for qualified nurses, and their chief work is dealing "with applications for admission to the register." Then, after considering the nature of this "chief work," Lord Sands concluded that, if it constituted the entire scope of the council's operations, it would be educational and therefore charitable. "Has the council any other purposes? I take it that it is "regarded as being in the interest of the sick . . . that there "should be in this country a body of nurses of undoubted "efficiency and of full and adequate training as attested by a

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[7] 13 T.C. 819, 849.

[8] 14 T.C. 645, 651.

"responsible body. The system is designed to protect the public "and to raise the standard of nursing generally in the interests "of the community, and in particular of the sick."

The judge then proceeded to consider whether there was still some other purpose which had the result of disabling the council from making good its claim to establishment for charitable purposes *only*, and in the passage which is recited and relied upon by Danckwerts J., but which we do not here repeat, Lord Sands concluded [9] that the professional *cachet* which registration confers upon the nurses ought not, in his view, to have the effect of requiring the Act to be interpreted as one designed in the professional interest of the nurses, and not as one established rather in the general public interest. Nevertheless, in the end of all, Lord Sands found it impossible—whatever might have been his view had the question been entirely novel—to distinguish the case from that of the General Medical Council.[10] "No doubt in "that case the professional benefits are greater and of a some-"what different quality, but I do not think that this can affect "the matter so long as the professional benefits, as in the present "case, are not intangible."

To the same effect were the judgments of Lord Blackburn and Lord Morison; and, though Lord President Clyde would clearly for his own part have distinguished the case from that of the General Medical Council, in the end he did not dissent from his brethren.

We add one citation from Lord Morison [11]: "In my view, "the reasoning in these decisions" (that is, the *General Medical Council* case [12] and *St. Andrews Hospital* v. *Shearsmith* [13]) "applies to the present case. The statute here is not described "as an Act for the education of nurses. . . . In establishing the "register the purpose of the statute is to secure that the "vocation of nurse shall be regulated. It enables nurses to "obtain a definite qualification if their abilities and training "equip them sufficiently to attain a definite standard."

It is not perhaps entirely easy to say how far the judges of the Court of Session intended to go in finally deciding, as they did, that the *Nursing Council* case [14] could not be distinguished from that of the *General Medical Council.*[15] In view of the opinions which they appear themselves to have entertained, it is difficult to suppose that they intended to hold that the whole scheme of the nursing legislation was to regulate the profession of nurses and that "it is in the first instance as a professional "measure that the legislation is to be regarded." (See *per* Sargant L.J., loc. cit., supra.) But it was, we think, not necessary for the Scottish court to go so far. We think it is sufficient, but also necessary, to say that the decision of that court depended upon the view to which they felt in the end compelled, that the professional purposes of the legislation, and the professional benefits for nurses in the way of enhanced status and prestige, which the legislation was designed to confer, could not be regarded as merely ancillary to the benefit intended to be provided for the public or for a section of it, namely, the sick. It has not been suggested that there is any difference as regards main objects between the Nursing Councils for England and Wales and for Scotland: each is a counterpart of the other. It follows, therefore, in our judgment, that we ought to treat the conclusion of the Scottish Court of Session as strongly guiding, if not governing, our own conclusion. We add, indeed, that for our part we respectfully do not think that it would be possible to take, for present purposes, a view more favourable to the Nursing Council than that formed by the Scottish judges. In the result, it seems to us that the view which Danckwerts J. formed as to the main objects of the council ought not to be supported if by his language, above cited, he intended to infer that what we may call the professional aspect of the legislation was of merely secondary or ancillary significance.

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[9] 14 T.C. 645, 652.

[10] Ibid. 653.

[11] Ibid. 659.

[12] 13 T.C. 819.

[13] (1887) 19 Q.B.D. 624; 2 T.C. 219.

[14] 14 T.C. 645.

[15] 13 T.C. 819.

But, in truth, it may not be useful nor even possible to try to give a primacy to the one purpose rather than to the other; and all the more, perhaps, should the attempt be abandoned in the present case, where the statute speaks of "main objects" in the plural. As observed in the Scottish court, the chief duty and function of the council is the formation and maintenance of the register of nurses. The results were and were intended to be, on the one hand, the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. The two achievements are essentially inseparable. The public are benefited because the nursing profession is improved and its status enhanced. The profession of nursing is improved in quality and prestige because and to the extent that the public is benefited and safeguarded.

If, then, the main objects of the council cannot be confined to securing or promoting the benefit of the public or the ailing section of the public, can it be said that those main objects are " concerned with the advancement of social welfare " ? We attach, in the circumstances of the present case, particular importance to the words " concerned with "; and we agree with Mr. Cross that it is not sufficient if the main objects are somehow or other related to, in some sense connected or " mixed up with," the advancement of social welfare. In our judgment, the advancement of social welfare (in this case) or of religion or education or of all or some of those activities (in other cases) must be " the concern of " the main objects; in other words, it must in the present case be established that the main objects, which we have, we hope, sufficiently now defined, are directed to the advancement of social welfare. Unless the words are so interpreted, the whole phrase in the section is given, as it seems to us, a scope so vague and embracing that every non-profit-making activity some aspect of which could be said to tend to the promotion of social welfare would be brought within the section—a result which, in our judgment, Parliament cannot have contemplated.

If we are right so far, then, applying as best we can the tests of common sense and of the common usage of our language, but without any attempt at defining the term " social welfare," we would answer the question—Are the main objects of the council directed to the advancement of social welfare?—in the negative. In the first place, we cannot, with all respect to Danckwerts J., agree that every organization " established for benefiting the " public " should be treated as one the main objects of which are concerned with the advancement of social welfare: on the ground that, since " welfare " is synonymous with well-being, therefore social welfare and public benefit must mean and are the same thing. On this view, it would seem to follow that every statutory or other scheme for regulating any professional body would prima facie qualify within the section. As Sargant L.J. observed in the *General Medical Council* case,[16] the proper regulation of the professions of the law or of accountancy must indubitably be for the public benefit, since those sections of the public who required the assistance of lawyers or accountants would thereby be safeguarded and assisted. Moreover, so wide a significance attributed to the words " social welfare " would make the earlier reference to the advancement of education wholly otiose. Further, such a view appears to us inconsistent with the reasoning of this court as expressed in Parker L.J.'s judgment in *National Deposit Friendly Society Trustees* v.

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[16] 13 T.C. 819.

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Skegness Urban District Council,[17] and with the restriction which, according to that judgment, has to be applied to the wide and vague meaning which the phrase "social welfare" might otherwise bear.

But it was contended that, whatever be the intended scope and limits of "social welfare," provision for the health of individual members of the community is undoubtedly comprehended among the characteristics and obligations of what is called the welfare State; that the provision of competent nurses is an essential part of every health service; and accordingly that the council's concern with the nursing profession is sufficient qualification within the meaning of the section.

Though the argument is both formidable and attractive, it is not, in our judgment, sufficient. The answer to it is, in our view, provided by the conclusion which we have already expressed that it is not enough that the objects of the organization are in some degree related to the advancement of social welfare: they must in a real sense be directed to it. It is no doubt perfectly true that some part at least of the work of some nurses is properly described as social welfare work, however that phrase be defined. But it must equally be true, in our judgment, that other parts of nurses' work could not fairly be so described. A nurse engaged by a private person of means to live in his or her house and tend to his or her medical requirements could not, in our view, be sensibly referred to as performing work of social welfare. The link can no doubt be seen; but it is, in our judgment, too remote.

An argument was presented to us upon the authority of *Inland Revenue Commissioners* v. *Baddeley* in the House of Lords.[18] The question in that case largely turned on the construction of the words "religious" (or "moral") "social or physical "well-being." This court had felt able to give to this phrase a restricted sense sufficient to make the objects of the trust charitable; but the House rejected that view. "I do not think," said Viscount Simonds,[19] "it would be possible to use language "more comprehensive and more vague. I must dissent from the "suggestion that a narrow meaning must be ascribed to the "word 'social'; on the contrary, I find in its use confirmation "of the impression that the whole provision makes upon me, "that its purpose is to establish what is well enough called a

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[17] [1957] 2 Q.B. 573; [1957] 3 All E.R. 199.

[18] [1955] A.C. 572; [1955] 1 All E.R. 525; 35 T.C. 661, 694.

[19] [1955] A.C. 572, 586.

"community centre. . . ." To the like effect was the speech of Lord Tucker, who observed that [20] "the promotion of social well-"being" would "appear to cover many of the activities of the "so-called 'welfare State' and to include material benefits and "advantages which have little or no relation to social ethics or "good citizenship, concepts which are themselves not easily "definable." So in the present case it was said that, since "welfare" meant no more and no less than "well-being," social welfare was a phrase so comprehensive as to include (at least) the intended and inevitable results and achievements of the Nursing Council.

Our answer to this argument is, first, that the phrase with which we are here concerned is, after all, "social *welfare*" and not "social *well-being*." That, of itself, no doubt does not take the matter very far, particularly in view of the speeches in *Baddeley's* case [21] and of the conclusion of this court in the *National Deposit* case [22] that the words "welfare" and "well-"being" prima facie mean the same thing. But the phrase "social welfare" in section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, appears in a context: a context in which it is preceded by the words, among others, "advancement . . . of education"; and those words, for reasons which we have already given, must, we think, limit inevitably, and give some degree of precision to, what might otherwise be merely vague and all-comprehending.

Then, further, the phrase "social welfare" has, in our judgment, now acquired a meaning which, however difficult of definition, has at least something in it of the characteristics of a term of art. In such a sense it is used, for example, in the Miners' Welfare Act, 1952; and the phrase which we are concerned to construe is repeated in section 12 (7) (*b*) of the Copyright Act, 1956. In so repeating it, Parliament must at least have assumed a certain precision of meaning, even if it has not seen fit to offer any clues for the guidance of the judges.

In the *National Deposit Friendly Society* case [23] this court forbore from attempting a definition, and we do not propose to neglect that example. The most that the court can do—as the court did in the *National Deposit* case [23]—is to say whether in its judgment a particular case does or does not come within the section, and in so doing to apply as best it can the ordinary standards of common sense and language. So far as is necessary

[20] [1955] A.C. 572, 613.

[21] [1955] A.C. 572.

[22] [1957] 2 Q.B. 573.

[23] Ibid.

or relevant to the performance of that duty, the court may say that certain characteristics are or are not to be discerned in the conception of social welfare.

In the judgment of the court in the preceding case [24] reference was made to certain points that emerge from this court's judgment in the *National Deposit* case,[25] including the necessity of imposing some limitation upon what otherwise might be the extreme vagueness of the language used by Parliament. One ground for such limitation was the circumstance that the relevant provision in the Act confers an exemption from rates at the expense of the general body of ratepayers. Additional grounds may be found in the following passage from the judgment [26]: "It "is, we think, in considering this question, that the persons to "be benefited and the source of the benefits become pertinent "considerations. Where the benefits are confined to the "members, and where these benefits are derived entirely from "their own contributions, it may well be difficult to say that the "object is the advancement of social welfare for its own sake, "even though the benefits themselves may advance the well-"being of the individual members. It is true that the question "is whether the object is one 'concerned' with the advancement "of social welfare, but though 'concerned' is a wide word, we "do not think that it can be read as bringing in as an object "something which is incidental."

We have tried to apply such considerations to the solution of the case of the Nursing Council, and, so applying them, have come to the conclusion that its main objects are not shown to be "concerned with the advancement of social welfare." We have, we hope, in the course of this judgment, at least indicated with sufficient clearness, even if without much precision, why we think so. In such a case, as Lord Radcliffe observed in a wholly different context, the law cannot be set at rest by any neat combination of words. But, if we can add anything to illustrate the limitation which we think should in this context be put upon social welfare, it would be that the phrase involves at any rate the conception of what used to be called "good works": the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate. We do not suggest this by way of definition, but only as an indication why, in our judgment, the advancement of social welfare ought not to be

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[24] *Berry* v. *St. Marylebone Borough Council*, ante, p. 406.

[25] [1957] 2 Q.B. 573.

[26] Ibid. 583.

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equated with the promotion, generally, of the well-being, in every sense and of every kind, of society or sections of society; why, therefore, everything which can be shown to tend to the public advantage cannot, for the purposes of the section, be treated as concerned with the advancement of social welfare; and why, more particularly, the General Nursing Council cannot succeed in bringing themselves within the relevant section of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

In our judgment, the appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.; Pontifex, Pitt & Co.*

E. D.

WEINBERGS WEATHERPROOFS LTD. *v.* RADCLIFFE PAPER MILL CO. LTD.

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Nov. 5, 6, 27.

Harman J.

Landlord and Tenant—Business premises (Security of Tenure)—Break clause—Notice to determine terms—Whether notice effective—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 24.

By a lease dated October 17, 1950, certain rooms in a building were demised to the plaintiffs for a term of 20 years from September 29, 1950. Clause 5 of the lease provided that if either the landlords or tenants were desirous of determining the lease on the expiration of the first seven or 14 years of the term they should give six months' notice in writing to the other side. In January, 1957, the landlords sold the entire building to the defendants, who informed the plaintiffs of the sale, and on January 18, 1957, served on the plaintiffs a notice of their intention to determine the lease and the term thereby created on September 29, 1957:—

Held, that the notice was effective to cut down the term demised by the lease and the plaintiffs were holding over merely by virtue of the Landlord and Tenant Act, 1954; the defendants could, however, at any time serve a statutory notice under section 25 of the Act and the plaintiffs could at any time apply for a new tenancy under section 26.

Castle Laundry (London) Ltd. v. *Read* [1955] 1 Q.B. 586; [1955] 2 All E.R. 154 considered.

Per curiam. The bargain entered into by the parties to a lease should not be altered by statute more than was necessary to give the statute its proper effect.

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ADJOURNED SUMMONS.

By this summons the plaintiffs, Weinbergs Weatherproofs Ltd., asked the court to determine whether a notice dated January 18, 1957, and served on the plaintiffs by the defendants, the Radcliffe Paper Mill Co. Ltd., was effective to determine the terms demised by two leases dated, respectively, October 17, 1950, and January 7, 1953.

By a lease dated October 17, 1950, the Bleachers Association Ltd. as landlords demised to the plaintiffs certain rooms in a building known as The Clough Bleachworks, Radcliffe, Lancashire, for a term of 20 years from September 29, 1950, at a rent of £270 per annum payable quarterly in arrear. The lease contained the usual lessee's covenants to repair, a proviso for re-entry and a covenant for quiet enjoyment. Clause 5 provided: "Provided always and it is hereby agreed that if the "[tenants] shall be desirous of determining this present lease "at the expiration of the first seven or fourteen years of the "term hereby granted and of such their desire shall give six "calendar months' previous notice in writing to the [landlords] "and shall pay all the rent and perform and observe all the "covenants hereinbefore reserved and contained and on the part "of the [tenants] to be paid performed and observed up to such "determination or if the [landlords] shall be desirous of determining this present lease at the expiration of the first seven or "fourteen years of the term hereby granted and of such their "desire shall give six months' previous notice in writing to the "[tenants] then in either of the said cases immediately after "the expiration of the said terms of seven years or fourteen "years as the case may be this present demise and everything "herein contained shall cease and be void."

By a second lease made January 7, 1953, between the same parties and expressed to be supplemental to the first, the landlords demised to the tenants further rooms in the same building for a term of 18 years from September 29, 1952, at a rent of £130 per annum. The lessee's covenants were made by reference to the principal lease and clause 3 provided: "The "covenant on the part of the [tenants] contained in clause 4 "of the principal lease and provisos contained in clauses 3 and 5 "thereof shall be deemed incorporated herein as if the same were "herein repeated." The plaintiffs occupied all the rooms demised by both leases.

In 1957 the landlords sold the whole of the Clough Bleachworks to the defendants and on January 17 communicated this fact to the plaintiffs. On January 18 the defendants sent to the plaintiffs a document in the following terms: "In pursuance of "the powers contained in the leases made October 17, 1950, and "January 7, 1953, between the Bleachers Association Ltd. of "the one part and yourselves of the other part under which the "rooms numbered . . . thereby demised are held we—[and then "the solicitors to the defendants]—hereby give you notice that "it is the intention of the said Radcliffe Paper Mill Company Ltd. "to determine the said leases and to put an end to the terms "thereby respectively created on September 29, 1957, being the "end of the first seven years of the said terms."

The plaintiffs, to whom Part II of the Landlord and Tenant Act, 1954, applied, sought a declaration that on the true construction of the leases and the Landlord and Tenant Act, 1954, the notice dated January 18, 1957, was ineffective to determine the terms granted by the leases and that the defendants were not entitled to give the plaintiffs a notice under the Act to terminate their tenancy on any date before September 29, 1964. No point was taken on behalf of the plaintiffs that Michaelmas, 1957, was not the end of the first seven years of the second term.

A. J. Balcombe for the tenants. The summons raises the question of the effect of a notice to quit in ordinary form purporting to exercise a break clause in a lease of business premises, having regard to the effect of the Landlord and Tenant Act, 1954, Part II. It is agreed that Part II of the Act applies to the tenancies and the tenants do not dispute that the leases could have been determined by six months' notice expiring on September 29, 1957, but for Part II of the Act.

Section 24 (1) provides that a tenancy to which Part II of the Act applies shall not come to an end unless "terminated in "accordance with the provisions of this Part of this Act." The method of terminating the tenancy appears in section 25. Section 24 (1) means what it says; the appropriate notice is not now one under the leases (that is the combined effect of sections 24 and 25), and the statutory notice supersedes a notice under the lease but has the same effect. The tenants submit that because no notice in accordance with section 25 has been served upon them by the landlords, then since the tenancies are for 20 and 18 years' duration respectively ending at Michaelmas, 1970, they are still continuing.

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[*Orman Brothers Ltd.* v. *Greenbaum*[1] was referred to, with particular reference to the judgment of Lord Goddard C.J.[2]] *Castle Laundry* (*London*) *Ltd.* v. *Read*[3] is distinguishable in that there the notice exercising the break clause was given before the coming into operation of the Act and the Landlord and Tenant (Notice) Regulations made thereunder. The result was as if the lease had come to an end by effluxion of time. If the decision is not distinguishable, then it is wrong. In *Milletts* (*Victoria*) *Ltd.* v. *Northley House Ltd.*[4] the only decision was that the statutory notice was valid. There is nothing in these cases to require departure from the clear meaning of section 24 (1).

Alan Fletcher for the landlords. Two principles should be observed in this case: first, the court should not interfere with the previous law of landlord and tenant more than is necessary to give effect to the statute; secondly, in construing the Act the court should look at the long title: see *Bagettes Ltd.* v. *G. P. Estates Ltd.*[5] Although the object of Part I of the Act is to provide security of tenure, the object of Part II is to enable tenants to obtain new tenancies. This notice served by the landlords was effective, notwithstanding the Act, to cut down the terms of the leases to seven and five years respectively, and since the termination of the leases the tenants have been holding over by virtue of the right given by the Act; this right is an estate of uncertain duration and is called a " business statutory tenancy " in the *Castle Laundry* case.[6] Where a tenancy has been granted for a fixed term, the Act draws a clear distinction between the original contractual term and the statutory estate which follows: see sections 24 (3) (*a*), 27 (2); see also the Rent Act, 1957, Sch. IV, para. (2). There should be the same distinction where the contractual term is terminated by notice to quit or by the exercise of a break clause.

Section 24 (1) can reasonably be construed without holding that a notice to quit has no effect at all upon a tenancy to which Part II applies; a notice to quit does produce an effect under section 44 (1). In any case the court is primarily concerned here not with section 24 (1) but with sections 25 (3) (*a*), 25 (4) and 26 (2).

The *Castle Laundry* case[7] is indistinguishable on this point, and to give "effluxion of time" a narrow meaning would produce absurd results, if, for example, a yearly tenant granted a subtenancy for 21 years. Finally, if the tenants' contention is right, the landlords could never have served a notice that was good both under the contract and under the Act.

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[1] [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.

[2] [1955] 1 W.L.R. 248, 250 et seq.

[3] [1955] 1 Q.B. 586; [1955] 2 All E.R. 154.

[4] [1956] J.P.L. 744; [20 Conv. 507].

[5] [1956] Ch. 290; [1956] 1 All E.R. 729.

[6] [1955] 1 Q.B. 586, 592.

[7] [1955] 1 Q.B. 586.

Balcombe in reply. The landlords' contention, that the notice was effective to determine the contractual relationship between the parties so as to bring the term to an end and leave the tenants with a so-called business statutory tenancy terminable by six months' notice under the Act, is not valid, because (1) there is no contractual relationship between the parties which the notice is effective to determine, for the defendants were not the original lessors. Their only relationship is by privity of estate; therefore, all that the notice can purport to terminate is the estate in the land, that is, the tenancy. The Act says that the notice cannot do this. (2) There is no justification for this purported distinction between the tenancy and the contract whereby it was created: see *per* Denning L.J. in *Sidney Bolsom Investment Trust* v. *E. Karmios & Co. (London) Ltd.*[8]

Cur. adv. vult.

November 27. HARMAN J. read the following judgment in which he stated the facts and continued: It is the contention of the plaintiffs that by reason of section 24 of the Landlord and Tenant Act, 1954, this notice is of no effect, and that they remain in occupation of the demised property under the two leases which cannot now be broken until 1964. The defendants, on the other hand, do not contend that the notice was sufficient to put an end to the leases at Michaelmas, 1957, but they argue that it was sufficient to abridge the leases at that date with the result that the plaintiffs are now in occupation merely by the effect of the statute. It is no part of the plaintiffs' case that the notice of January 18, 1957, would not have been sufficient, but for the statute, to bring the terms under both leases to an end. No point was made that in respect of the second lease, Michaelmas, 1957, was not the end of the first seven years of the term thereby granted (as the notice states) but the end of the fifth year.

A reference to the long title of the Landlord and Tenant Act, 1954, shows that the object of Part II was "to enable tenants "occupying property for business . . . purposes to obtain new "tenancies in certain cases." It is agreed that the plaintiffs are tenants answering that description and that Part II of the

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[8] [1956] 1 Q.B. 529, 537; [1956] 1 All E.R. 536.

Act applies to them. I need not therefore read section 23. Section 24 is in these terms: " (1) A tenancy to which this Part " of this Act applies shall not come to an end unless terminated " in accordance with the provisions of this Part of this Act." Section 25 (1) provides: " The landlord may terminate a tenancy " to which this Part of this Act applies by a notice given to the " tenant in the prescribed form specifying the date at which the " tenancy is to come to an end (hereinafter referred to as 'the " 'date of termination')." " (2) Subject to the provisions of " the next following subsection, a notice under this section shall " not have effect unless it is given not more than twelve nor " less than six months before the date of termination specified " therein." Subsections (3), (4), (5) and (6) of section 25 deal further with notices given under section 25. It is not suggested that such a notice has been given. Section 26 deals with the tenant's request for a new tenancy and no such request has been made here. The definition section, section 69, under the heading " notice to quit " is in these terms: " 'notice to quit' means a " notice to terminate a tenancy (whether a periodical tenancy or " a tenancy for a term of years certain) given in accordance with " the provisions (whether express or implied) of that tenancy."

The result is that a notice exercising a right to break a lease for a term of years is included in the expression " notice to quit " in this Act. It is to be observed, however, that this phrase does not refer to a notice given by the landlord under the Act, but to the common law notice given in accordance with the terms of the lease or the law apart from the Act.

The plaintiffs' argument has the merit of simplicity, namely, that their tenancies are tenancies of 20 years' and 18 years' duration ending at Michaelmas, 1970, and are still continuing as such because no notice has been given in accordance with section 25. The defendants argue that the notice was, notwithstanding the Act, effective to cut down the terms of the two demises to seven and five years, respectively, and that the plaintiffs are now holding over merely by virtue of the statute and not by virtue of the leases alone. If this be right the defendants are in a position to serve on the plaintiffs at any time a notice conforming to section 25 and thus set the machinery of the Act in motion and so put an end to the plaintiffs' right of occupation unless they successfully apply for a new tenancy under section 26. In that view it would also be open to the plaintiffs to apply for a new tenancy whether or not they be served by the defendants with notice under section 25.

These sections have been discussed in the Queen's Bench Division. In *Orman Brothers Ltd.* v. *Greenbaum*,[1] the Court of Appeal, affirming Devlin J., held that a notice to quit not in conformity with the Act was invalid because though given before the Act came into force it was given for a date after that event. Lord Goddard C.J. said this[2]: "Therefore the position is that "the Act was passed on July 30, and was to come into force on "October 1; and when the Act is in force there can be no doubt "that the landlord must give a notice in the prescribed form. "I do not think anyone doubts that the words 'A tenancy to "'which this Part of this Act applies shall not come to an end "'unless terminated in accordance with the provisions of this "'Part of this Act' means 'shall not come to an end unless it "'is brought to an end by the method laid down by the Act'; "that is to say, by notice to quit in the prescribed form. Section "66 of the Act is in these terms: '(1) Any form of notice "'required by this Act to be prescribed shall be prescribed by "'regulations made by the Lord Chancellor by statutory instru-"'ment.'" He added[3]: "I desire to say that we are here "considering a notice to quit given after the regulations came "into force—because the regulations came into force on August "27—which became effective on a day after the Act came into "force. It is not a notice to quit given before the regulations "came into force, nor is this a case in which the notice to quit "was given for a day before the Act came into force. It is a "case where the regulations had come into force three days "before the notice to quit was given, and where the date of "expiry of the notice to quit was October 4, that is, three days "after the Act came into operation. When one bears that in "mind, it is really unarguable that the landlord had not to use "the statutory form, because the provisions of the Act are, first "of all, that the Lord Chancellor can by regulation prescribe "when a particular form is to become effective." That judgment must, of course, be considered in relation to the facts of the case. The tenancy was a four-weekly one and no question of a break in a term arose. The only question was one of dates. It has no materiality for my purposes.

More relevant is *Castle Laundry (London) Ltd.* v. *Read*.[4] In that case the lease was for a term of 21 years, determinable

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[1] [1954] 1 W.L.R. 1520; [1955] 1 W.L.R. 248 (C.A.); [1954] 3 All E.R. 731; [1955] 1 All E.R. 610.

[2] [1955] 1 W.L.R. 248, 251.

[3] Ibid. 252.

[4] [1955] 1 Q.B. 586; [1955] 2 All E.R. 154.

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Harman J.

at the seventh or fourteenth year on six months' notice in writing. Such a notice was served by the landlords on June 11, 1954, before the Act was passed and was admittedly a good notice when served. The defendants argued that it was invalidated by the Act which came into force during its currency on October 1, 1954. The judge held that this was not so, that it was effective to cut the term down to seven years though not to put an end to the tenancy which was, as he held, terminated by a six months' notice in the statutory form dated January 19, 1955. The argument there was chiefly as to the efficacy of the second or statutory notice, but the validity of that depended of course on whether the earlier notice cutting down the term to seven years was effective. The judge said this [5]: "The desire of the landlord "being to invoke that clause—[as to the break]—and to terminate "the lease at the first opportunity at the end of the seven year "period, he gave notice on June 11, 1954, expressing his desire, "and giving the tenants, the plaintiffs in this action, notice to "quit and to deliver up possession on December 25, 1954. It is "agreed that that was a proper notice under the lease and one "which, so far as the contractual relationship between the "parties was concerned, would have brought this lease to an end "on December 25, 1954, and that the other provisions in the "lease which were available for its further performance would, "in accordance with clause 3 (b), have ceased to have any "effect, and everything else would have been void." Then he discusses the intervention of the Act and goes on to say [6]: "The "notice of January 19, 1955, given by the landlord was a notice "terminating the tenancy on July 22, 1955, which complies with "section 25 (2) as regards duration. What is said on behalf of "the landlord—and, I think, accurately said—is that, having "regard to the fact that October 1, 1954, had passed, the Act "makes it impossible to terminate a tenancy unless it is terminated in accordance with the provisions of the Act, and the "Act, through the regulations, has specified the appropriate form "of notice terminating the tenancy, and that that notice has been "given. The contractual tenancy, it is said, came to an end on "December 25, 1954, but, because of the operation of section 24, "the tenancy did not come to an end and could not come to an "end unless terminated in accordance with the Act; the tenancy "was said, I think rightly, to continue as a business statutory "tenancy which, the landlord now contends, has been terminated "by the notice which the Act requires."

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[5] [1955] 1 Q.B. 586, 591.

[6] Ibid. 592.

The case is distinguishable from the present in that there the notice to break the term was given before the Act was passed and was, therefore, undoubtedly valid when given, and what the judge held was that the coming into force of the Act did not invalidate it so far as it operated to break the term, though it made it ineffective to end the tenancy which continued as what he called a business statutory tenancy. This is a convenient phrase so long as one does not confuse it with the so-called statutory tenancy under the Rent Restrictions Acts, that, of course, being not a tenancy at all, whereas having regard to the language used in the Act of 1954 the term must be thought of as continuing by way of a statutory extension (see the observations of Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*,[7] where the following appears: "In his Lordship's opinion the right view was that the "common law tenancy subsisted with a statutory variation as "to the mode of termination"). Sellers J. also speaks of the "contractual relationship" between the parties.[8] It does not appear from the report whether the landlord giving the notice was the original lessor, though it does appear that the plaintiffs were the original lessees. The point was taken before me that here, anyhow, the parties were not the original lessor and lessee and there was no privity of contract between them but only privity of estate. In my view this has no importance, for it is not to be denied that an assign of the reversion retains as against an assign of the lease the right originally made by contract between the original lessor and lessee to break the term by notice. The decision of Sellers J. has been adversely commented upon in a note in the Law Quarterly Review, Vol. 71, 1955, p. 329, where it is called a hard case. With all respect to the author of that note I do not agree with him. Nevertheless the case, right or wrong, is not an authority for the view that a notice served as here after the coming into force of the Act of 1954 is still valid to abridge the term of the lease. My attention was also called to a note of a decision of Pilcher J. in 1956.[9] The note is to be found in the Second Permanent Supplement to Woodfall's Landlord and Tenant, 25th ed., p. 337, and appears to afford some support to the defendants, but the report is so brief as to be of little value. I say no more with regard to it.

In this state of the authorities I must in effect make up my own mind. In my judgment the notice has the limited effect for which the defendants contend. Having regard to section 24 of the Act of 1954 it is not effective to put an end to the tenancies, but I do not see why it should be of no effect at all. What were the terms of years created by the leases?—not 20 years and 18 years certain, but 20 and 18 years determinable by notice at Michaelmas, 1957. This was the bargain made between the plaintiffs as parties to the leases, and the rights and obligations under them have devolved on the parties to this suit. It does not seem to me to be necessary, in order to give to the Act that effect which the statute intended, to deprive the landlords of the right to shorten the term in this way. The Act still leaves the tenants with the right of occupation which they would have had if the terms had originally been of seven and five years respectively, and the right to claim a new tenancy whether the landlords serve a statutory notice to determine under section 25 or not. The tenants have therefore got the right to obtain a new tenancy which they are promised in the long title to the Act and I do not see why they should have something more which the instruments of lease under which they held did not give them. The principle must be that the bargain should not be altered by the statute more than is necessary to give the statute its proper effect and I hold, accordingly, that though section 24 operated to prevent the notice from causing the terms to come to an end it was effective to break the terms as the instruments of lease provided that it should do. There is still time for the tenants to exercise their rights under section 26 (2) if no statutory notice be served by the landlords, or under section 29 (2) and (3) if such a notice shall be served.

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[7] [1957] 1 Q.B. 159, 168; [1956] 3 All E.R. 624.

[8] [1955] 1 Q.B. 586, 593.

[9] *Milletts (Victoria) Ltd.* v. *Northley House* [1956] J.P.L. 744; [20 Conv. 507].

I drew some comfort from the fact that the learned editors of the second permanent supplement to Woodfall's Landlord and Tenant, 25th ed., appear to take the same view as I have done on this question (see p. 16).

If the view above expressed be wrong I have some difficulty in seeing how a landlord can ever avail himself of his right under a "break clause" in a lease. To take the present case, the landlords, in order to exercise their rights at the end of the first seven or fourteen years of the term of the lease dated October 17, 1950, must give six previous months' notice in writing to the lessees of their desire to determine the lease. This is to be contrasted with the requirements of section 25 (1) whereby the tenancy can only be determined by a notice "in "the prescribed form." These forms were prescribed by the Lord Chancellor originally by Statutory Instrument No. 1107 of 1954, which, as amended in respects not here relevant, was in force up to July 9, 1957. Under this instrument (paragraph 4) it is provided that the forms in the appendix or forms substantially to the like effect shall be used for, among other things, a notice under the provisions of section 25 of the Act. Turning to form (vii), I do not myself see how, if the notice is to be substantially to the effect of that form, it can comply with the break clause, with the result that either the right to break will not be effectually exercised or the notice will not be in the statutory form and will therefore be ineffective. In the present case the result would be that no effective notice could ever be served until the 20th year, a departure from the bargain between the parties which I cannot think to have been contemplated by the legislature.

I hold, therefore, that the notice was effective to determine the terms given by the leases subject, nevertheless, to the provisions of the Act.

Declaration accordingly.

Solicitors: *Carr, Sandelson & Co.; Woodcock, Ryland & Co. for Woodcock & Sons, Haslingden, Lancs.*

P. P.

In re TACON. PUBLIC TRUSTEE *v.* TACON.

[1954 T. No. 858.]

C. A.

1957
Nov. 20, 21;
Dec. 19.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Charity—Practicability—Bequest—Intervening tenancy for life—Vested reversion liable to be divested—Whether bequest practicable—Form of inquiry.

A testator, who died in 1922, by his will and codicils settled his residuary estate on his daughter for life, with remainder to her children, and, in the event of her having none, he directed his trustees to apply one-sixth part of his ultimate residuary estate in purchasing, adapting and furnishing and equipping suitable premises at Ipswich, Felixstowe or Lowestoft or any or either of those places as a convalescent hospital for nurses or patients or both. His daughter died a spinster in 1952. At the date of the testator's death the one-sixth share amounted to £16,500, a sum which would then have been adequate to enable his trustees to comply with the testator's directions to purchase and equip a convalescent hospital. If the reversionary interest had then been sold, having regard to the daughter's expectation of life and to the possibility that she might have children, it would have fetched £2,400, a sum admittedly inadequate for the purpose. At the daughter's death the one-sixth share fell into possession; it was then worth £10,000, an insufficient sum to carry out the testator's purpose. Harman J. directed an inquiry, in the form adopted in *In re White's Will Trusts* [1955] Ch. 188; [1954] 2 All E.R. 620, whether it was practicable to carry into execution the trust. In answer to that inquiry, he held that it was not practicable at the testator's death, nor was there at that date any reasonable prospect that it would be practicable to do so at some future time:—

Held, (1) that in the case of a gift for some admittedly charitable purpose, where there was no general charitable intention, the gift failed if, at the date of the testator's death, it was shown to be impracticable to give effect to the testator's purpose, but that, in the case of a gift of a vested remainder liable to be defeated, the question was not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would be practicable to give effect to such purpose at some future time.

(2) That at the testator's death it was not practicable to give effect to the trust to purchase and equip a convalescent hospital, because his daughter was then alive and the then value of the reversionary interest was inadequate for the purpose; but that, at that time, since the one-sixth share of the estate was then worth an amount sufficient to give effect to the trust, and since there was then admittedly no reason to anticipate the subsequent increase in estate duty and fall in the value of money, there was at the testator's death a reasonable prospect that it would be practicable to give effect to the trust, and, accordingly, the trust took effect.

In re Slevin [1891] 2 Ch. 236; 7 T.L.R. 394; *In re Moon's Will Trusts* (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300; *In re Wright* [1954] Ch. 347; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864; *In re White's Will Trusts* [1955] Ch. 188; [1954] 2 All E.R. 620 considered.

Per curiam. The inquiry as to practicability should proceed, where the gift to charity, although future, is vested but defeasible, on the footing that the gift will not be defeated but will, at some future time, take effect in possession.

Decision of Harman J. reversed.

APPEAL from Harman J.

By his will dated January 27, 1919, Sir Thomas Henry Tacon gave his residuary estate to his trustees upon common form trusts for conversion and investment and to hold the trust fund so constituted upon trust for his daughter Maude Mary Tacon during her life and, from and after her decease, upon trust for such of her issue as she should appoint, and, in default of appointment, "In trust for all or any of the children or child of my said "daughter who being sons attain the age of 21 or being daughters "attain that age or marry and if more than one in equal shares: ". . . and if there shall be no child or other issue of my said "daughter living at her death I empower her to appoint by will "such sum or sums (not exceeding in the aggregate £20,000) "out of the trust fund" as she should think proper. The will continued: "And in the event of the failure or determination of "all the trusts hereinbefore declared and contained as to the "whole or any part of the trust fund then the following provisions "shall take effect (namely)": there followed pecuniary legacies for charitable and other purposes, and finally: "And my trustees "shall stand possessed of the residue of the trust fund the trusts "whereof have so failed or determined or of so much thereof "as shall not become absolutely vested," in trust for the testator's nephews as therein stated. That last-mentioned trust was revoked by the third codicil, dated January 16, 1920, to the will, which provided: "Whereas under my said will my trustees "are to stand possessed of the residue of the trust fund the trusts "whereof have failed or determined as therein mentioned or of "so much thereof as shall not have become absolutely vested or "be applied or disposed of under the trusts or powers therein "contained or by law vested in my trustees In trust for my "nephews the sons of my brother in equal shares as therein "mentioned Now I hereby revoke such last mentioned provisions "and declare that my trustees shall stand possessed of such "residue or of so much thereof as shall not become vested . . ." "As to Five equal sixth parts thereof" for nephews as therein mentioned; "And as to the remaining one equal sixth part In "trust to apply the same in purchasing adapting and furnishing "and equipping suitable premises at Ipswich Felixstowe or "Lowestoft or any or either of those places as a Convalescent "Hospital for Nurses or Patients or both preference being given "to persons from Eye or adjoining Parishes or members or staff "of the East Suffolk County Council and the Hospital to be "managed and carried on by the Board of Management of The "East Suffolk and Ipswich Hospital if they are willing to under- "take it such Hospital to be called 'Sir Thomas Henry Tacon's

"'Hospital.'" Provisions followed for the management of the hospital should the board decline to undertake it.

The testator died on February 19, 1922, and his daughter Maude, who was then aged 39 years and a spinster, survived him. She died, never having been married, on October 22, 1952. At the date of the testator's death, one-sixth part of residue, after allowing for the £20,000 to be appointed by the daughter, was stated to be worth approximately £16,500, a sum sufficient to purchase and equip a convalescent hospital.

The then value of the reversionary interest was estimated to be £2,400, after allowing for the daughter's life interest and the possibility that she might have children. At her death the share was worth £10,000, a sum insufficient for the testator's purpose.

The Public Trustee, as trustee of the testator's will and codicil, took out a summons asking (inter alia) whether the trust declared by the third codicil to the testator's will for the application of one-sixth of his residuary estate in purchasing and equipping a convalescent hospital was a valid charitable trust or failed by reason of the trust being impracticable. The summons also asked for an inquiry whether at the date of the testator's death it was practicable to carry into execution the trust for the purchase and equipment of such a convalescent hospital or whether at that date there was any reasonable prospect that it would be practicable to do so at some future time. The defendants to the summons included William Harold Scarfe, personal representative of the testator's widow, one of his statutory next-of-kin and the Attorney-General.

Harman J. held, in answer to the inquiry, that it was not at the date of the testator's death practicable to carry into execution the trusts in respect of a convalescent hospital and that at that date there was no reasonable prospect that it would be practicable to do so at some future time. He further held that there was an intestacy as to such one equal sixth part of the testator's residuary estate.

The Attorney-General appealed.

Denys Buckley for the Attorney-General. The question is at what date does the practicability of a vested reversionary gift for charitable purposes fall to be determined where the interest of the charity is liable to be divested. On the true construction of this will, the gift to charity is a vested gift liable to be divested.

It is not a contingent gift. Both when the testator made his will in 1919, and when he died in 1922, a one-sixth share of his ultimate residuary estate was sufficient to carry out his charitable purpose. In 1952, when Maude died, the share was insufficient and it will have to be applied cy-près. Owing to the increase in rates of estate duty and to the decreased purchasing power of the pound, it was at Maude's death in fact impracticable to give effect to the testator's wishes. A charitable trust is held to fail for impracticability, on the ground that the court cannot execute an impossible trust. The onus of proving that a trust is impracticable rests on him who asserts it. The court will hold that a trust is a valid charitable trust without requiring evidence that it is practicable. A temporary impediment will not defeat a charitable trust: *Attorney-General* v. *Bishop of Chester.*[1] If it cannot be shown ab initio that a charitable trust is impracticable, it will take effect. The next-of-kin are shut out if they fail to discharge the initial burden of showing impracticability. They have to show not only existing impracticability but they must also show clearly that it will never be practicable to put the trust into operation.

The authorities show that lapse in the case of a gift to a charity is treated similarly to that of a gift to an individual. Charity is regarded as a quasi-person. A gift to a charity, which is dissolved before the testator's death, fails. A gift to a charity, which is subsequently dissolved but before the gift is applied, is treated as good. *Chamberlayne* v. *Brockett*[2] shows that a gift to a charity falls to be construed in the same way as a gift to an individual. For example, the rule against perpetuities applies to future gifts to charity. There need not be continuance of practicability. Some gifts may be contingent on practicability when they take effect. A contingent interest is as much property as any other kind of property: *Fisk* v. *Attorney-General.*[3] [Reference was made to the observations of Chitty J. and Lindley L.J. in *In re Rymer.*[4]]

In re Slevin[5] was the basis of the decisions in *In re Moon's Will Trusts*[6] and *In re Wright.*[7] Those decisions show that in the case of a future interest the test of impracticability falls to be applied at the date of the testator's death and that the onus of establishing it is on those who allege it. Both those cases were cases of reversionary gifts and they are on all fours with this case, except that here the gift is either a vested gift liable to be divested or it is contingent. The latter case was subsequently compromised. The form of the inquiry in this case follows that in *In re White's Will Trusts.*[8]

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[1] (1785) 1 Bro.C.C. 444.

[2] (1872) L.R. 8 Ch. 206.

[3] (1867) L.R. 4 Eq. 521.

[4] [1895] 1 Ch. 19, 24, 35; 11 T.L.R. 20.

[5] [1891] 2 Ch. 236; 7 T.L.R. 394.

[6] (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300.

[7] [1954] Ch. 347; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864.

A charitable trust must take effect when the gift is made, and the question whether the gift is practicable is decided then. It is not possible to subject the testator's bounty to a condition which he has not himself imposed. It is a question of construction whether the testator intended the test of practicability to be applied when the gift is paid. On the true construction of this will the testator has not postponed the application of the test of practicability until the share becomes payable. The gift to the charity in this case is a true remainder. It is a gift after all the prior gifts. It is not a gift over on a contingency. Harman J. should have held that there was at the testator's death a practical prospect that the charitable trusts could be carried into effect.

Harold Lightman Q.C. and *A. C. Sparrow* for William Harold Scarfe. Harman J.'s decision is correct and the form of the inquiry which was directed was right. It is not possible for a judge now to put on the spectacles of 1922 for all purposes. The question is, was there then any reasonable prospect of the testator's project becoming practicable? The decisions in *In re Moon*[9] and *In re Wright*[10] are accepted. Indeed, the case of the next-of-kin rests on those decisions. The difficulty arises from a departure from the principles there laid down. The inquiry has two limbs. There are impediments which prevent one saying that the scheme was practicable at the date of the testator's death. It would be possible to say that a scheme was practicable in the case of a deferred legacy, when it would be only a question of time before the money became available. The charity in this case had merely a chance that the money might become available. It is necessary to determine practicability as regards quantum at the death. The form of inquiry in *In re White's Will Trusts*[11] extends the inquiry to include the question whether at the death there is any prospect that the scheme will be practicable at the relevant time. Practicability depends on possession at the relevant time of the means to carry out the charitable intention. Here there was no such means. The value of the charity's interest at the death was insufficient. All the factors have to be considered. All the charity had at the time of the testator's death was a chance that it might become entitled to a sixth share of the ultimate residue. That is not enough.

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[8] [1955] Ch. 188; [1954] 2 All E.R. 620.

[9] [1948] 1 All E.R. 300.

[10] [1954] Ch. 347.

[11] [1955] Ch. 188.

Denys Buckley in reply. In considering whether a gift to charity is practicable, the fact that the gift may be defeated is not a relevant consideration. The fact that the chance that the charity will benefit is remote does not mean that the trust fails ab initio for impracticability. Practicable here means "workable." [Reference was made to Tudor on Charities, 5th ed., p. 27, and to *In re James.*[12]]

P. S. A. Rossdale for the Public Trustee.

Cur. adv. vult.

December 19. The following judgments were read.

LORD EVERSHED M.R. It is well established that in the case of a gift to a charity (that is, to some body of persons or organization admittedly charitable) where no general charitable intention is present, then (1) if the charity has ceased to exist before the will comes into operation the gift lapses; but (2) if the charity is still in existence at the date mentioned, it is effective as a gift to the extent that the interests of the next-of-kin (or of whoever else take in default of the charitable interest taking effect) are for ever excluded, notwithstanding the later dissolution or disappearance of the charity: see *In re Slevin.*[1] In these respects the "charity" is assimilated to an ordinary individual legatee.

The same principles apply to a gift, not to a named charity, but for some (admittedly) charitable purpose where (again) there is no general charitable intention. Such a gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. But the test of vagueness or uncertainty or impracticability is to be applied at the date of the testator's death; if at that date the disposition is shown to be impracticable (confining myself henceforth to that case)—that is, incapable for any reason of being practically initiated or administered—then the gift fails altogether and the next-of-kin

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[12] [1932] 2 Ch. 25; 48 T.L.R. 250.

[1] [1891] 2 Ch. 236; 7 T.L.R. 394.

C. A.

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TACON, *In re.*

Lord Evershed M.R.

(or whoever else are entitled in default) take. Per contra, if the charitable gift is not then shown to be "impracticable," the next-of-kin or other interests are for ever excluded, even though later supervening events defeat the precise purpose contemplated by the testator. In such case the gift will be administered cy-près, and in my opinion the onus will (prima facie, at any rate) be upon those seeking to invalidate the charitable gift.

In the case of a charitable gift expressed to take effect immediately on the testator's death, no great difficulty arises. The difficulty has arisen in the present case because the gift for the purpose of establishing the particular convalescent home envisaged by the testator is, on any view, expressed to take effect upon the happening of a future—and, indeed, a relatively distant—event.

[His Lordship read the relevant portions of the testator's will, stated the facts, and continued:] The principles which I have stated (apart from the matter of onus) were not contested by Mr. Lightman, who also conceded that the gift for the charitable purpose with which we are concerned is in form an absolute or "vested" remainder liable to be defeated upon the happening of a specific event, namely, the coming into existence of issue to Maude capable of taking. What follows is limited to such a form of gift. Different considerations may, to some extent at any rate, be applicable to the case of a strictly contingent gift.

In the present case, upon the principles already stated, the effect of the disposition will be to exclude the next-of-kin, unless "impracticability" is shown at the death of the testator. But since the charitable gift was not an immediate gift, the question is not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would at any relevant date be practicable: see *In re Moon's Will Trusts* [2] and *In re Wright.*[3] In the latter case the form of inquiry thought to be appropriate was as follows[4]: "(1) an inquiry "whether it is now or will at any future time be possible to carry "into execution the trusts declared by the will. . . ." That inquiry (perhaps for obvious reasons) the master had thought unanswerable. To meet the difficulty caused by such form of inquiry, Upjohn J. had, in *In re White's Will Trusts*,[5] suggested a variation in form, which has been used in the present case, where the inquiry directed is: "An inquiry whether at the date of the "death of the testator it was practicable to carry into execution "the trust for the purchase and equipment and management of "suitable premises in Ipswich, Felixstowe or Lowestoft, or any "of those places as a convalescent hospital for nurses or patients "or both, or whether at the said date there was any reasonable "prospect that it would be practicable to do so at some future "time."

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[2] (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300.

[3] [1954] Ch. 347; [1954] 2 All E.R. 98; affirming [1954] 1 All E.R. 864.

[4] [1954] Ch. 347, 350.

[5] [1955] Ch. 188; [1954] 2 All E.R. 620.

If by the first half of the inquiry the question intended is whether it was, on the testator's death and as things then were, practicable to give effect to the relevant disposition, no doubt the answer is "No": because at that date the testator's daughter, Maude, was alive and aged 39, her expectation of life was over 30 years, and the then present value of the remainder was about £2,400, a sum admittedly and obviously inadequate for the purpose. But the contest before us has been upon the effect of the second half of the inquiry. Mr. Lightman has argued that for the purpose of answering this part of the inquiry financial considerations are no longer relevant. Mr. Lightman has said (and, having regard to the concessions which he has made, it has been, if I have correctly understood him, his main if not his sole point) that the only relevant figure remains £2,400; that you cannot take account of the actual sum that would be, or would be expected to be, received in the event of the gift taking effect. In other words (according to the argument) you are, so far as financial considerations are concerned, limited to or by the figure of £2,400, being the actual value of the interest at the testator's death—increased, at best, by such interest as it might have earned during the expected duration of Maude's life. I have been unable to agree. I think the words of the inquiry mean what they say: namely, whether, at the date of the testator's death, there was any reasonable prospect (according to the ordinary beliefs and knowledge of mankind in 1922) that at some future date this scheme would be "practicable." In my judgment, since the relevant proportion of the estate was then worth £16,500 or upwards, an amount at the testator's death admittedly sufficient and amply sufficient for the intended gift, and since there was then no reason (again admittedly) to anticipate the subsequent increase in duty and fall in the value of money, the answer is clearly "Yes." Mr. Lightman, indeed, so concedes, if (contrary to his view) you can take these financial considerations into account.

But the question also arose in argument whether, on this form of inquiry, you should also take into account the chances of the disposition taking effect at all—since if it did not, then nothing at all would be available. The answer to the question depends upon whether the word "practicable" ought to be treated as meaning "capable, for financial or other reasons, of "being carried out," but confined to that meaning: in other words, whether practicability is to be judged on the assumption that the disposition does at some time take effect, or whether, on the other hand, remoteness is to be taken into account as affecting practicability: so that in the case, for example, of a gift taking effect only upon an extremely remote and improbable event, it would be said that the chances of it being effective were so small that in common sense its "practicability" should be rejected.

Mr. Buckley was disposed to concede that the form of inquiry in the present case did bring remoteness into the estimate of practicability. In my judgment, upon the facts of this case, it does not, in the end, matter one way or the other whether that view is right or wrong. For if it is legitimate or necessary to take into account the possibilities of the disposition taking effect at all, the result is not affected. Maude at the relevant date was 39 years old and was still unmarried. According to the evidence she was attractive, and it was regarded by those who knew her as surprising that she had not married. A photograph, taken in the fashion of her age, was exhibited. But this evidence, to my mind, cuts both ways. At least there was obviously a reasonable prospect that she would die childless.

Since the matter has been debated, it may be desirable for me to say that, as a matter of principle, I accept Mr. Buckley's view, that is, that the test, for the purposes of the validity of a charitable gift, of "practicability" is that of workability as the word was used in the argument—that is, whether the disposition is one which the court can, as a matter of practice, for financial or other reasons, administer: and to that test the question of remoteness is irrelevant. That is to say, the question of "practicability" is to be answered upon the footing that the gift does at some date take effect: though the answer must be given as at the testator's death. In other words, the court must, as it were, put on for all purposes 1922 spectacles; must put itself into the position of one forming a judgment of future prospects (of practicability) at the date of the testator's death. I add this so that it may, if necessary, be considered, for the purpose of removing doubts or difficulties, in the framing of similar inquiries in the future.

For the reasons I have given, I think that this appeal should be allowed.

ROMER L.J. I agree. In his argument on behalf of the respondent, William Harold Scarfe (a representative of the testator's next-of-kin), Mr. Lightman, very rightly and properly, if I may say so, made certain admissions and thus narrowed the issues between the parties. He conceded: (1) that such matters as the change in the value of money, the increased cost of house property, increases in taxation, and the like, which occurred after the death of the testator in 1922, are irrelevant to the inquiry whether the gift, which is in question in this case, failed for impracticability; (2) that once property has become vested in a charity, or in furtherance of a charitable purpose, it will not become divested in favour of persons entitled in default by reason of the subsequent dissolution of the charity or the subsequent impracticability of the purpose, as the case may be; (3) that, as a matter of construction of the testator's will and codicil, the gift for the purchase and equipment and management of suitable premises in Ipswich, Felixstowe or Lowestoft for the purpose prescribed by the testator was not contingent but was vested, though defeasible; (4) that the only point of time at which the question as to the practicability of the gift fell to be put and answered was the date of the testator's death—in accordance with, or by analogy to, *In re Moon*,[6] *In re Wright*,[7] and *In re White's Will Trusts*[8]; (5) that the value of one-sixth of the testator's residuary estate at his death (£16,500) was sufficient at that time, had it then been available for the purpose, to carry the charitable trust into effect; and (6) that, if it was relevant under the second limb of the inquiry directed by the order of October 26, 1954, to take into account the possibility of the testator's daughter Maude having issue capable of taking, such a possibility would not in itself justify a negative answer to the inquiry.

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[6] 64 T.L.R. 123.

[7] [1954] Ch. 347.

[8] [1955] Ch. 188.

Accepting, as he did, these various points, Mr. Lightman's contention was that the second limb of the inquiry was directed solely to the practicability of the testator's charitable project as a project—as to the feasibility, from a mechanical or administrative view only, of carrying the proposed scheme into effect. His submission was that although the question of finance was relevant to the first limb of the inquiry, the prospect or possibility of future financial sufficiency had nothing to do with the second. The only material matter to be taken into consideration from a financial point of view was the reversionary value of the one-sixth of residue, the subject of the charitable bequest; which was, at the testator's death, £2,400. That, Mr. Lightman said, was the " property " of the charity, and, as it was wholly insufficient to carry out the bequest, it followed, of necessity, that the gift failed for impracticability at the outset. Mr. Lightman admitted that if he was wrong in that submission the appeal must succeed.

In my judgment, it cannot rightly be said that a hypothetical reasonable person, looking forward in 1922 to the future, and assessing the prospect of it becoming practicable at some time to carry the charitable trust into execution, would be precluded from taking into account (inter alia) what money might one day be available for the purpose; for one of the most obvious reasons why a charitable bequest for a particular purpose may be deemed impracticable is that there is, or will be, insufficient money to enable it to be carried out. True it is that in 1922 a purchaser of the charity's reversionary interest would have paid no more than £2,400 for it—which is why the first limb of the inquiry obviously had to be answered in the negative. But by the very terms of the bequest it was not intended by the testator to come into operation until a distant, possibly a far distant, date, videlicet, the death of his daughter without having issue who should attain a vested interest. It is to the future, then, that the reasonable man in 1922 would have directed his mind in considering the practicability of the gift; and if (as was quite possible) the one-sixth share of residue, when it fell into possession, should be worth more or less the same as it was in 1922 there would be sufficient money to give effect to the testator's charitable purpose. If that view of the matter be right, as in my opinion it is, it disposes of the appeal in the appellant's favour; for, apart from the financial aspect of the matter, it has not been suggested that in 1922 there was any ground of impracticability—save for the possibility of Maude having children, upon which, as I have said, Mr. Lightman did not found himself.

I agree with the observations which have fallen from the Master of the Rolls as to the form of inquiry which was directed in this case. In view of Mr. Lightman's concession with regard to the possible issue of Maude, it is unnecessary to decide whether, in 1922, the chance of such issue being born thereafter and attaining vested interests was a relevant consideration under the second limb of the inquiry. There is much to be said for the view that it was, for if it was permissible (as, in my opinion, it clearly was) to take into account the possibility of there being insufficient money to enable the scheme to be carried into effect, it is difficult to see why the possibility of there being no money at all should be excluded. However that may be, I agree that in most, if not all, cases the inquiry as to practicability should proceed, where the gift to charity, although future, is vested but defeasible, on the footing that the gift will not be defeated, but will, at some time in the future, take effect in possession; and that the inquiry should be so framed, in a proper case, as to make that plain.

For the above reasons, and those stated by the Master of the Rolls, I agree that this appeal must be allowed.

ORMEROD L.J. I agree. Mr. Lightman has conceded that the gift in question is a vested remainder liable to be defeated only if the testator's daughter Maude had issue. He has also agreed that the date at which the practicability or otherwise of the gift has to be considered is the date of the death of the testator. He argues, however, that as at that time the value of the remainder was only £2,400, which admittedly was insufficient to carry out the testator's intention, the answer to the questions in the inquiry must be in the negative, in spite of the fact that in 1922, when the testator died, the estimated value of one-sixth of the residue was £16,500. I find it difficult to understand the argument that the value of the remainder at the time of the testator's death is the sum to be taken into consideration when considering the question of practicability. It was certainly not the intention of the testator that the value of the remainder should be realized and a convalescent home built out of the proceeds. On the contrary, his intention was that a home should be built if and when his daughter died childless. At the time of the testator's death his daughter was 39 years of age and was unmarried. She did not in fact marry, although there is evidence that her friends expected that she would. Her expectation of life was put at about 30 years, and in fact she lived for about that length of time. In considering the question whether in February, 1922, there was a reasonable prospect that the gift would be a practicable proposition, I think the first question which would have to be considered would be: Assuming that the gift is not defeated, is the share of the residue sufficient to carry out the testator's intention? If that is the right question to be asked, there can be little doubt that it would be answered in the affirmative. It is true that, in the light of subsequent events, the money available is not now sufficient for the purpose, but no reasonable person would have been likely in 1922 to expect that the fall in the value of money and increase in death duties would have taken place, at least to the extent to which they have done so.

The further question which has been considered is whether the gift was impracticable in view of the prospect of it being defeated by the testator's daughter marrying and having children. For my part, I doubt whether this should be a relevant consideration, although it would appear to be so having regard to the form of the inquiry directed in this case. I would have thought that the proper approach to the question would be on the basis of the gift not being defeated. However, on the facts of this case, there was at least a reasonable chance that Maude would die without having any children, and that in consequence the gift would not be defeated. It is unnecessary, therefore, in this case, to consider the question of the remoteness of the possibility of the gift taking effect.

I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Treasury Solicitor; Wrinch & Fisher for Block & Cullingham, Ipswich.*

B. A. B.

In re WHITWORTH ART GALLERY TRUSTS. MANCHESTER WHITWORTH INSTITUTE *v.* VICTORIA UNIVERSITY OF MANCHESTER AND ANOTHER.

1957
Dec. 12, 20.

Vaisey J.

[1957 W. No. 440.]

Charity—Scheme—Jurisdiction to sanction—Royal Charter, body incorporated by—Insufficient funds to maintain activities—Scheme to transfer premises and funds to another body.

The Manchester Whitworth Institute was incorporated by Royal Charter on October 2, 1890, its objects being, inter alia, the management and conduct of the Whitworth Art Gallery which contained a permanent collection of pictures and exhibition of textiles which was open to the public. The freehold of the building, the contents thereof and the investments held for its purposes were the property of the institute. The income of the institute having become insufficient to maintain its activities, the governors now sought the approval of a scheme for the management and administration of the trusts of the charity relating to the gallery, its contents and the investments by and for the transfer of the premises to the Victoria University of Manchester on condition that the university as sole trustee should take over the art gallery and be solely empowered to manage it, and although keeping it open to the public should have facilities for using it at certain times exclusively for purposes connected with the university:—

Held, that a charitable corporation founded by Royal Charter could be regulated or controlled by the court especially on financial grounds and the court was entitled to have regard to changed circumstances; accordingly, the court had full jurisdiction to sanction the scheme and would do so.

Attorney-General v. *Governors of Christ's Hospital* [1896] 1 Ch. 879; 12 T.L.R. 242; *Attorney-General* v. *Earl of Clarendon* (1810) 17 Ves. 491; *Attorney-General* v. *Governors of the Foundling Hospital* (1793) 2 Ves.Jun. 41 considered.

ADJOURNED SUMMONS.

By this summons, the Manchester Whitworth Institute applied to the court for the settlement of a scheme for the administration and management of the trusts of the charity relating to the freehold property known as the Whitworth Art Gallery in the city of Manchester, and the contents thereof and the investments of moneys held for the purposes thereof, and for the transfer of the said premises by the applicants to the Victoria University of Manchester, upon the trusts and subject to the terms and conditions to be contained in such scheme.

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WHITWORTH ART GALLERY TRUSTS, *In re.*

The facts are summarized from the judgment of Vaisey J.

The applicants (hereinafter called "the institute") were established in 1890 for certain charitable purposes in connexion with the city of Manchester in memory of the late Sir Joseph Whitworth, Bt., with endowments provided out of his estate and subsequently increased by contributions from other sources. The institute was incorporated by Royal Charter dated October 2, 1890, and its objects as therein set forth were various. Subsequently the activities of the institute were confined to only a few of its objects, which may be summarized as follows:—

The institute acquired and laid out a public park known as the Whitworth Park adjacent to the land on which now stood the Whitworth Gallery hereinafter referred to, and the said park was demised by the institute for a term of 999 years at a peppercorn rent to the Manchester city corporation who undertook to maintain the same and had ever since done so. Further, the institute took over, managed and developed, two institutions respectively known as the Manchester School of Art and the Manchester Technical School, but these had been transferred to the Manchester city corporation and there remained as the only activity in which the institute was engaged, the management and conduct of the Whitworth Gallery, hereinafter called "the gallery," being the museum and art gallery, open to the general public, which was situate on the south side of Manchester and about two miles from the centre of the city.

The gallery contained a permanent collection of pictures and other works of art and of textiles and other miscellaneous exhibits. Special exhibitions of works of art and textiles were from time to time held in the gallery, the freehold of which and of the site on which it stood was held by the institute in fee simple. The institute also owned the permanent exhibits therein and the furnishings and fittings thereof. It was the practice of the institute from time to time to lend the pictures and other works for exhibitions elsewhere than in Manchester. The gallery enjoyed a high reputation and provided a centre for persons interested in the pictorial arts. It was visited by students and other interested persons from various parts of the world. It possessed a famous collection of water colours and drawings, and its collection of textiles was of great historical interest and was particularly appropriate to Manchester as the centre of the Lancashire textile industry. The institute and the gallery had many well-wishers and supporters in Manchester and the surrounding districts, and the gallery had in the past received and continued from time to time to receive many gifts of works of art for exhibition and substantial additions had been made to its collections by private benefactors. An unofficial group of persons known as "The Friends of the Whitworth" actively interested themselves in the gallery and subscribed annually to a fund for its support.

The financial position became unsatisfactory; its income from all sources became insufficient to maintain the activities of the institute, while its current expenditure showed a continuing tendency to increase with no visible prospect of augmentation of its income from any source. The governors of the institute had come to the conclusion that soon the institute would either have to be closed down or its activities reduced to a scale unworthy of its traditions. Consequently, the Victoria University of Manchester had been approached with proposals for the transfer of the gallery to the university along with its contents and endowments and to the taking over by the university of the gallery as a museum and art gallery open to the general public but having a special connexion with the university similar to the connexion which united the Ashmolean Museum to the University of Oxford, or the Fitzwilliam Museum to the University of Cambridge. There had been a provisional agreement in the terms of the scheme, for which the approval of the court was now sought, which involved the followings conditions: first, that the university itself should be the sole trustee of the gallery and solely empowered to exercise all the functions of management vested in the institute and, secondly, that the university, though accepting the obligation to keep the gallery open to the public, should have special facilities therein for its own purposes for the instruction of art students, and to hold examinations, receptions, musical concerts and recitals therein, and for those purposes, when necessary, temporarily to exclude the public from the gallery or some part or parts thereof. It was represented to the court that it was proper to accede to these conditions, and that the university might be trusted to maintain the reputation and tradition of the gallery and for that purpose from time to time, as need arose, to supplement the income from endowments out of its own revenues, availing itself of the assistance and support of former members of the council of the institute and of the "Friends of the Whitworth," and particularly the services of Miss Margaret Pilkington, who had for many years acted as an honorary director of the gallery, so long as she was able and willing to continue to act in that capacity. The draft scheme was now submitted to the court for approval.

K. J. Elphinstone for the Manchester Whitworth Institute. Tudor on Charities, 5th ed., p. 178, and Halsbury's Laws of England, 3rd ed., p. 416, both set out the position as to the jurisdiction of the court in respect of a charity incorporated by Royal Charter. Tudor does not suggest that the court never has power to order a scheme with regard to such a charity: the word used is " establish " a charity. The true position is: (i) The court will not interfere with the corporation's conduct of its internal affairs (e.g., as to the election of governors), even if irregularities are alleged. (ii) If the corporation has committed no breach of trust, and no difficulty requiring a cy-près application has arisen, the court will not interfere with the management of the charity property merely because it is said that the corporation could exercise its powers better or more efficiently, but will leave the corporation to exercise the powers of management given by the charter as it thinks best. Subject to these restrictions, the court has always had, and has repeatedly exercised, jurisdiction to direct a scheme in relation to the property and revenues of a charity incorporated by charter, not only where there has been a breach of trust but also where there have been difficulties or changes of circumstance necessitating a scheme. [The following cases were referred to: *Attorney-General* v. *Smart* [1]; *Attorney-General* v. *Middleton* [2]; *Attorney-General* v. *Governors of the Foundling Hospital* [3]; *Attorney-General* v. *Clarendon.*[4]]

In *Attorney-General* v. *Governors of Christ's Hospital* [5] the court rejected the scheme brought in by the Attorney-General because (i) it would have deprived the governors of their powers and the governors objected, and (ii) it would have varied the provisions not only of the charter incorporating the charity but also of a special Act of Parliament. The court, however, had no doubt as to its jurisdiction to approve the alternative scheme brought in by the governors themselves. In the present case the corporation itself asks for the proposed scheme, and the provisions of the charter will be in no way affected.

Denys Buckley for the Attorney-General. The expression " establish " a charity used in Tudor on Charities, 5th ed., p. 178, refers to the regulation by the court of the execution of the trusts applicable to its funds: *Attorney-General* v. *Smart*[6]; *Attorney-General* v. *Middleton.*[7] The court can order the execution of the trusts of the charity even if the charity be incorporated by Royal Charter: *Attorney-General* v. *Middleton.*[7] *Attorney-General* v. *Governors of Christ's Hospital*[8] is by inference in my favour. On the language of the judgment, it is clear that the court refused to approve the Attorney-General's scheme only because of the opposition of the governing body. The case is authority for the proposition that the court can direct a scheme; it is *not* authority for the proposition that the court has no jurisdiction to direct a scheme where a body is incorporated by Royal Charter.

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[1] (1748) 1 Ves.Sen. 72.

[2] (1751) 2 Ves.Sen. 327.

[3] (1793) 2 Ves. 41.

[4] (1810) 17 Ves. 491.

[5] [1896] 1 Ch. 879; 12 T.L.R. 242.

The court will not direct a scheme whereby the trustees will be removed against their will. Where a body is incorporated by charter the court will not do anything inconsistent with the terms of the charter; but as to the execution of the trusts applicable to funds held by such a body the court has jurisdiction to make orders affecting the funds leaving the body itself unaffected.

D. S. Chetwood, for the Victoria University of Manchester, supported the arguments in favour of the scheme. The court has jurisdiction to direct a cy-près scheme where the funds of a charity incorporated by Royal Charter are not sufficient for the carrying out of the trusts as originally constituted: *Berkhampsted School Case.*[9]

Cur. adv. vult.

December 20. VAISEY J. read the following judgment in which he stated the facts and, having said that the scheme put before him received his full approval, continued: The only question upon which a doubt was felt is the one upon which I must now give my decision, that is to say, whether this charity, having been founded by Royal Charter, is one to which the cy-près application may be directed on the ground of the insufficiency of its revenues. This question is answered in the affirmative in the textbooks, especially Tudor on Charities, 5th ed., pp. 178–9, and Halsbury's Laws of England, 3rd ed., vol. 4, pp. 416–7. In fact, however, the question cannot be answered either affirmatively or in the negative without qualification, and the proper principle and true test to be applied may, in my judgment, be stated somewhat as follows.

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[6] 1 Ves.Sen. 72.

[7] 2 Ves.Sen. 327.

[8] [1896] 1 Ch. 879.

[9] (1865) L.R. 1 Eq. 102.

But I turn first to one of the latest cases on the subject, *Attorney-General* v. *Governors of Christ's Hospital*,[1] which, at first sight, seems to be contrary to the statements in the textbooks. The difficulty of the decision is to discover whether it would have gone the other way if the existing governing body of the institution had supported the proposed scheme which was there sought to be sanctioned instead of opposing it, as they did. The following passage from the judgment of Chitty J. reads as follows[2]: "The extent and the limits of this jurisdiction [the "jurisdiction of the court] were fully discussed in the argument. "Many authorities bearing more or less on the present case "were cited, and reference was made to an able and useful "dissertation on the subject contained in the report of the Royal "Commissioners mentioned in the preamble of the Act of 1869, "and in great measure founded on the opinions given in evidence "before the commission of eminent lawyers, such as Lord "Westbury, Lord Hatherley, Sir Roundell Palmer, Mr. Wickens, "and others. For the purposes of this decision, however, I think "it unnecessary to examine critically the authorities cited or the "opinions referred to. I prefer to state my own opinion broadly. "I hold that it is beyond the jurisdiction of the court to sanction "the Attorney-General's scheme in the face of the opposition "of the existing governing body. Their title is founded on Royal "Charter, and is established by Act of Parliament. To whatever "lengths the court may have gone, it has never assumed legis"lative authority; it has never by a stroke of the pen at one and "the same time revoked a Royal Charter and repealed an Act of "Parliament. It has never ousted from its rights of administer"ing the charitable trusts such a body as the present governors "against their will, and that, too, in a case where no breach "of trust is charged. There is no authority in the books for any "such proposition. Yet such is the proposition which underlies "the Attorney-General's scheme. I consider that I am not at "liberty to deprive the existing governing body of their right of "control over the income of the funds vested in them, either "permanently, as proposed by the scheme, or temporarily, as "suggested by the Attorney-General in his reply. In a word, "I cannot, under guise of executing the trusts cy-près, upset the "constitution of the present governing body, or, by transferring "their powers and duties of administering the trusts to another "body, reduce them to the position of being bare trustees of the

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[1] [1896] 1 Ch. 879; 12 T.L.R. 242.

[2] [1896] 1 Ch. 879, 888, 889.

"funds vested in them. To establish such a scheme as that "submitted by the Attorney-General, nothing less than an Act of "Parliament will suffice."

I have looked at some of the authorities cited in the *Christ's Hospital* case,[3] and the proposition which seems to me to emerge from them is that a charitable corporation founded by Royal Charter cannot be re-founded or re-established by the court, but can be regulated and controlled by the court, especially on financial grounds, and in that case the court is entitled to have regard to altered circumstances: see *Attorney-General* v. *Earl of Clarendon*,[4] which seems to illustrate the nature of the distinction to be drawn. It was held that the court could not interfere in the matter of the election or amotion of the corporators, but could give directions by scheme as to the application of the income having regard to the founder's directions on the one hand and on the other to the alteration of circumstances which might under a literal adherence to them be adverse to their general object and spirit. The following passage appears in the judgment of Sir William Grant M.R.[5]: "With regard to the "application of the income, it is alleged, that some of the pur"poses, to which it ought to be applied, are neglected; and that "part of it is applied to purposes, not within the scope of the "charity. The purposes, to which, after providing for the sus"tentation of the school, the surplus income is to be applied, are "partly specified by the founder's rules; and partly left to the "discretion of the governors. As it appears, that the application "of the income is not in all respects agreeable to the directions of "the founder, I think, it is fit, that it should for the future be "fixed and ascertained by a scheme; having due regard on the "one hand to the founder's directions, and on the other, to the "alteration of circumstances, that may have taken place since "his time; and which may be such as to render a literal adherence "to his rules adverse to their general object and spirit."

The same principle seems to be illustrated by two of the cases relating to Berkhamsted School, founded by King Henry VIII and refounded by Act of Parliament in the reign of Edward VI; the first, *Berkhampsted School Case*,[6] recites a scheme of 1855 dealing with the insufficiency of the revenue at the foundation. The second, *In re Berkhamsted Grammar School*,[7] dealt with a similar predicament by means of a further scheme.

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[3] [1896] 1 Ch. 879.

[4] (1810) 17 Ves. 491.

[5] Ibid. 500.

[6] (1865) L.R. 1 Eq. 102.

[7] [1908] 2 Ch. 25; 24 T.L.R. 514.

1957

WHITWORTH ART GALLERY TRUSTS, *In re.*

Vaisey J.

In *Attorney-General* v. *Governors of the Foundling Hospital* [8] Lord Commissioner Eyre says this [9]: "I am satisfied, that "this court has a jurisdiction, that is, a limited jurisdiction, "with regard to all things of this nature: but I am also satisfied, "that it has no such jurisdiction as the counsel have proceeded "on. There is nothing better established, than that this court "does not entertain a general jurisdiction to regulate and controul "charities established by charter. There the establishment is "fixed and determined; and the court has no power to vary it. "If the governors, established for the regulation of it, are not "those, who have the management of the revenues, this court "has no jurisdiction; and, if it is ever so much abused, as far as "respects the jurisdiction of this court, it is without remedy: "but if those, established as governors, have also the management of the revenues, this court does assume a jurisdiction of "necessity, so far as they are to be considered as trustees of the "revenue. That is stated in the book upon charitable uses; and "referred to in several authorities; particularly in *Attorney-*"*General* v. *Smart* [10] and *Attorney-General* v. *Middleton.*[11] "The result is, this court must not hastily take upon itself to "interfere with those, who have by charter, and in this case by "Act of Parliament, the whole controul over this charity. But "where, having also the management of the revenues, they are "abusing their trust, the court has jurisdiction."

Attorney-General v. *Smart* [12] and *Attorney-General* v. *Middleton,*[13] cited in the *Foundling Hospital* case,[14] are earlier authorities which appear to define the limits of the court's jurisdiction, both of these decided by Lord Hardwicke L.C.

The draft scheme, with some slight alterations suggested and approved during the hearing, is, in my judgment, a fit and proper scheme which I have full jurisdiction to sanction, and I make the necessary order for that purpose.

Declaration accordingly.

Solicitors: *Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester; Treasury Solicitor.*

P. P.

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[8] (1793) 2 Ves. 41.

[9] Ibid. 48.

[10] (1748) 1 Ves.Sen. 72.

[11] (1751) 2 Ves.Sen. 326.

[12] 1 Ves.Sen. 72.

[13] 2 Ves.Sen. 326.

[14] 2 Ves. 41.

In re HATFEILD'S WILL TRUSTS.
HATFEILD AND ANOTHER *v.* HATFEILD AND OTHERS.

1957
Mar. 21, 22;
Apr. 17.

Harman J.

[1957 H. 52.]

Settlement—Construction—Acceleration—Will—Devise to A. for life with remainder to his sons in tail male, with remainder to C. in fee simple—A. disclaims, having had as yet no son—Disposal of intermediate income—Whether income expressly disposed of—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 175 (1).
Will—Intermediate income.

The testator, by his will dated May 18, 1938, devised certain freehold property to his cousin H. for life with remainder to H.'s sons successively in tail male with remainder to the testator's cousin A. for life with remainder to A.'s sons successively in tail male with remainder to the testator's cousin C. in fee simple. The testator gave his residuary estate to his trustees upon certain trusts. He died on February 9, 1941, and H., the first tenant for life, died on April 18, 1950, without issue. By a deed dated August 11, 1950, A., who as yet had no son, disclaimed his interest under the will. C., to whom the ultimate fee simple had been devised, died on June 11, 1951. On a summons taken out to determine whether, pending the birth of a son to A., or until his death, the income of the settled property should (i) be paid to the personal representatives of C., or (ii) be treated as income carried by the contingent interest of A.'s unborn son by virtue of section 175 (1) of the Law of Property Act, 1925,[1] and as such should be held upon trust for any son hereafter to be born to A., or (iii) should form part of residue:—

Held, (1) that, as a matter of construction of the will, until the birth of a son to A. the income of the settled property from the date of H.'s death should be paid to the personal representatives of C., whose interest in remainder had been accelerated by A.'s disclaimer.

(2) That the income was "expressly disposed of" within the exception to section 175 (1) of the Law of Property Act, 1925, since the testator by his will had made a complete disposition of

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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[1] Law of Property Act, 1925, s. 175 (1): "A contingent or future "specific devise or bequest of property, whether real or personal, "and a contingent residuary devise "of freehold land, and a specific or "residuary devise of freehold land to "trustees upon trust for persons "whose interests are contingent or "executory shall, subject to the "statutory provisions relating to "accumulations, carry the intermediate income of that property "from the death of the testator, "except so far as such income, or "any part thereof, may be otherwise "expressly disposed of."

the settled property, each interest therein arising on the cesser of a prior interest.

In re Scott [1911] 2 Ch. 374 not followed and held no longer binding.

ADJOURNED SUMMONS.

The testator, Gilliat Edward Hatfeild, by his will dated May 18, 1938, devised his freehold property known as the Hatfeild Estate to his cousin Herbert Seymour Hatfeild for life, with remainder to Herbert's sons successively in tail male with remainder to the testator's cousin Aubrey Cecil Hatfeild for life with remainder to Aubrey's sons successively in tail male, with remainder to the testator's cousin Cuthbert Hatfeild in fee simple. The testator gave his residuary real and personal estate to his trustees upon trusts for sale and conversion, and to divide the proceeds among his grand-nephews and grand-nieces. The testator died on February 9, 1941, and his will was proved by Herbert Seymour Hatfeild and the plaintiffs, being the executors therein named. On August 7, 1942, the executors by deed assented to the Hatfeild Estate vesting in Herbert Seymour Hatfeild, who died on April 18, 1950, without issue. Special probate of his will in respect of the Hatfeild Estate was granted to the plaintiffs on June 2, 1951. On August 11, 1950, Aubrey Cecil Hatfeild disclaimed his interest under the will, having as yet had no son. Cuthbert Hatfeild died on June 11, 1951, and his personal representatives were the first three defendants to this summons. The Hatfeild Estate was sold and was now represented by gilt-edged stocks and cash now held in the names of the plaintiffs. The fourth and fifth defendants were appointed additional trustees of the will for the purposes of the trusts effecting the residuary estate and represented residue for the purpose of the summons.

The questions raised by this summons, which was issued by the plaintiffs as trustees for the purposes of the Settled Land Act, 1925, of the settlement created by the will of the testator, were: (1) whether, having regard to the disclaimer by the plaintiff Aubrey Cecil Hatfeild, the income of the Hatfeild Estate and the investments for the time being representing the same, as from the death of Herbert Seymour Hatfeild until the expiration of 21 years from the testator's death or until a son was born to the plaintiff Aubrey Cecil Hatfeild, or until his death without having had a son, (a) ought to be paid to the personal representatives of Cuthbert Hatfeild as part of his estate, or

(b) ought to be accumulated and the accumulation held on trust for the first or only son who might be born to Aubrey Cecil Hatfeild, or if there were no such son, ought to be paid to the personal representative of Cuthbert Hatfeild, or (c) ought to be paid to the trustees of the residuary estate of the testator; (2) that the destination of the income for the period after the expiration of 21 years from the date of death of the testator until such time as a son should be born to Aubrey Cecil Hatfeild or until his death without having had a son, should be determined.

J. A. Plowman Q.C. and *G. D. Johnston* for the plaintiffs, the trustees of the settlement.

B. L. Bathurst Q.C. and *C. J. Slade* for the first, second and third defendants, the personal representatives of Cuthbert Hatfeild. The remainder in fee of the testator was accelerated by Aubrey's disclaimer so as to come into effect at once, subject to defeasance in the event of the birth of a son to Aubrey. Cuthbert's remainder should therefore be treated as accelerated: *In re Flower's Settlement Trusts.*[2] In that case it was held impossible to infer an acceleration from the terms of the deed, but in the present case the subsequent limitations are such that there is no need to construe the words "after the death" as meaning "subject to the interest of the prior taker," as in *Jull* v. *Jacobs* [3] and *Lainson* v. *Lainson.*[4] The ordinary rule should apply, and *In re Scott* [5] should not be followed, since the distinctions on which it turns between legal and equitable limitations have been abolished by virtue of the 1925 legislation.

P. Ingress Bell Q.C. and *G. M. Parbury* for the fourth and fifth defendants, additional trustees of the will for the purposes of the residuary trusts. During the remainder of the life of Aubrey the income is undisposed of by the specific devise and falls into the residue of the testator's estate. There is no acceleration, but there is an effective disposition because of the residuary gift in our favour.

J. A. Plowman Q.C. and *G. D. Johnston* (on behalf of the possible sons of Aubrey Cecil Hatfeild). By virtue of section 175 of the Law of Property Act, 1925, the income of the fund now representing the Hatfeild Estate, until a son is born to Aubrey or until his death, should be accumulated for the benefit of such son. It is agreed that before the Law of Property Act there might have been an acceleration, because a contingent specific devise of property did not then carry intermediate income before it vested, unlike a contingent future devise of residue to which *Countess of Bective* v. *Hodgson*[6] applies. In this connexion section 175 of the Law of Property Act, 1925, altered the law. The devise contained in the testator's will is tantamount to a contingent or future specific devise of the property, and the contingency in question is the birth of a son to Aubrey.

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[2] [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462.

[3] (1876) 3 Ch.D. 703.

[4] (1854) 5 De G.M. & G. 754.

[5] [1911] 2 Ch. 374.

Cur. adv. vult.

April 17. HARMAN J. read the following judgment. [His Lordship stated the facts and continued:] In the circumstances the question arises: What is the destination of the income of the fund now representing the Hatfeild Estate until it be known whether Aubrey will have a son, that is to say, during the period from the death of Herbert Hatfeild in 1950 until a son is born to Aubrey or until his death, whichever event first happens? This period is divided for the purposes of the summons into two, the first being the period of 21 years from the testator's death and the second the residue, if there be any. The reason for this is that, if any accumulation is directed, it cannot by reason of section 164 of the Law of Property Act, 1925, endure beyond the period of 21 years from the testator's death. There are three competitors for the income during this 21 years: first, the plaintiffs, who in reliance on section 175 of the Law of Property Act, 1925, claim that the income should be accumulated for the benefit of any son who may be born to Aubrey; secondly, the personal representatives of Cuthbert, the first three defendants, who allege that the remainder in fee of their testator was accelerated by Aubrey's disclaimer so as to come into effect at once, subject, of course, to defeasance if a son be born to Aubrey; thirdly, the last two defendants, who allege that during the rest of the life of Aubrey the income is undisposed of by the specific devise and falls into the residue of the testator's estate.

To take first the argument on behalf of the plaintiffs, they are content to admit that before the passing of the Law of Property Act, 1925, there would or might have been an acceleration because (they say) a contingent specific devise of property did not in those days carry the intermediate income before it vested, being in this respect unlike a contingent future devise of residue, to which *Countess of Bective* v. *Hodgson*[1] applied. On this footing they say that section 175 has altered the law, being such a "contingent or future specific devise or bequest "of property, whether real or personal . . . and a specific or "residuary devise of freehold land to trustees upon trust for "persons whose interests are contingent or executory" which "shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the "death of the testator, except so far as such income, or any part "thereof, may be otherwise expressly disposed of."

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[6] (1864) 10 H.L.C. 656.

This is, they say, "a contingent or future specific devise of "property," the contingency being the birth of a son to Aubrey. For present purposes I am content to agree that so far they are right. They nevertheless must still satisfy me that they can surmount the exception at the end of the section of income "otherwise expressly disposed of." Both sets of defendants argue that the income is so expressly disposed of, but here they part company, the representatives of Cuthbert claiming that the remainder to him is accelerated, but the representatives of residue claiming that there is no acceleration but that there is an effective disposition by the residuary gift in their favour.

There can be no doubt that, as a general rule, the effect of a disclaimer of the particular estate is to accelerate the estates in remainder. This is stated by Warrington J. in *In re Scott.*[2] He there says this: "There is no question that as a general rule "the effect of a disclaimer or other destruction of the particular "estate is to accelerate the estates in remainder." See, further, the statement of Jenkins L.J. in the recent case of *In re Flower's Settlement Trusts*,[3] where the Lord Justice said: "The principle, "I think, is well settled, at all events in relation to wills, that "where there is a gift to some person for life, and a vested gift "in remainder expressed to take effect on the death of the first "taker, the gift in remainder is construed as a gift taking effect "on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the "first taker fails—as, for example, because he witnessed the "will—or if the gift to the first taker does not take effect because "it is disclaimed, then the person entitled in remainder will take "immediately upon the failure or determination of the prior "interest, and will not be kept waiting until the death of the "first taker."

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[1] (1864) 10 H.L.C. 656.

[2] [1911] 2 Ch. 374, 377.

[3] [1957] 1 W.L.R. 401, 405; [1957] 1 All E.R. 462.

In *In re Scott*[4] Warrington J. held that this principle did not apply to real estate where the limitations were legal for reasons which, as he thought, precluded the arising of a legal interest in remainder defeasible in favour of a prior estate. The principle certainly applied to equitable limitations of real estate, of which a good example is *In re Conyngham*,[5] where it was held that the infant defendant took a life estate by acceleration pending the birth of a son to the plaintiff who would take as tenant in tail.

I will read the headnote in *In re Conyngham*[5]: "The "testator by his will, dated in 1915, devised his Kent estates "to the use of his trustees in fee simple, upon trust out of the "income to pay certain life annuities, and, subject as aforesaid, "the testator devised the said estates to the uses of his Irish "estates—namely, to the use of his brother, the plaintiff, for "life, with remainder to the use of the plaintiff's first and other "sons successively, according to seniority in tail male, with "remainder to the use of his nephew, the infant defendant, for "life, with divers remainders over in strict settlement, and an "ultimate remainder to the use of the testator's own right heirs. "By a codicil dated in 1916 the testator revoked the plaintiff's "life interest in the Irish estates 'and all other benefits' given "him by the will, and in lieu thereof he devised the Irish estates "to the use of his trustees during the plaintiff's life upon trust "to pay him a certain annuity out of income. In all other "respects he confirmed his will. In 1918 the testator died a "bachelor, leaving the plaintiff his heir-at-law. The plaintiff was "married in 1914, but had no children:—*Held*, that the testator "had shown a clear intention to make the equitable limitations "of the Kent estates completely exhaustive against his heir, and "consequently until the plaintiff had a son the infant defendant's "life interest in the surplus rents was accelerated." The limitations there were equitable. In that case a son was subsequently born to the plaintiff and the estate of the infant defendant determined upon the happening of that event.

In *In re Scott*,[6] Warrington J., having decided that there could be no acceleration for the technical reason which he gave, concluded nevertheless that the heir-at-law was excluded upon the true construction of the will on the ground that the residuary devise was a complete disposition of the real property not otherwise effectively disposed of, and held that the income fell into residue. This case is the high-water-mark of the cases supporting the claim of the residuary devisees here. It was distinguished in the cases which followed it, namely, *In re Willis*,[7] *In re Conyngham*[8] and *In re Brooke*.[9] In the latter case Russell J. had held the limitations to be legal and felt himself bound by *In re Scott*,[10] though he intimated that he did not agree with it. Younger L.J., both in *In re Brooke*[11] and in the earlier case of *In re Willis*,[12] doubted the correctness of *In re Scott*[13] for reasons connected with the Contingent Remainders Act, 1877, but the case was not overruled when the Law of Property Act came into operation. Now the limitations here are legal, and the question is whether I must follow *In re Scott*.[13] In my judgment that case is no longer binding, the 1925 legislation having swept aside distinctions of the kind between legal and equitable limitations.

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[4] [1911] 2 Ch. 374.

[5] [1921] 1 Ch. 491; 37 T.L.R. 420.

[6] [1911] 2 Ch. 374.

The question, therefore, is whether, as a matter of construction of this will, the ordinary rule as to acceleration applies. This rule is, of course, one of construction, and was held in *In re Flower's Settlement Trusts*[14] not to apply. That was a case of a deed in which it may be more difficult to apply the rule, and as a matter of construction both Upjohn J. and the Court of Appeal held that it was impossible to infer an acceleration having regard to the terms of that deed. In the present case the subsequent limitations are not expressed as arising from and after the death of the prior devisee or by reference to time, so that there is no need to construe " after the death " as meaning " subject to the " interest " of the prior taker as in such cases as *Jull* v. *Jacobs*[15] or *Lainson* v. *Lainson*.[16] The words " with remainder " have always, I think, been construed as showing that the subsequent estate arises upon the cesser of the prior estate, which, though expressed as " an estate for life," may fail before the death of the life tenant for various reasons, for instance, by forfeiture, whether under the terms of the will or outside it, because a spouse has witnessed the document, or, as here, by disclaimer. Consequently, in my judgment, the ordinary rule applies. There has been thus a complete disposition of the estate, each interest arising on cesser of a prior interest, and there is no gap into which the provisions of section 175 of the Law of Property Act, 1925, can intrude, the income being otherwise specifically disposed of.

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[7] [1917] 1 Ch. 365.
[8] [1921] 1 Ch. 491.
[9] [1923] 2 Ch. 265.
[10] [1911] 2 Ch. 374.
[11] [1923] 2 Ch. 265.
[12] [1917] 1 Ch. 365.
[13] [1911] 2 Ch. 374.
[14] [1957] 1 W.L.R. 401.
[15] (1876) 3 Ch.D. 703.
[16] (1854) 5 De G.M. & G. 754.

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HATFEILD'S WILL TRUSTS, *In re.*

Harman J.

This is enough to dispose of the claim on behalf of unborn infants and I need not consider the argument that section 175 has no application to unborn persons, though I observe that Lindley L.J. in *In re Holford*[17] used the following phrase: "To treat the "future possible rights of unborn persons as existing rights even "if only contingent would have been to depart from sound prin-"ciples with no sufficient justification."

Under these circumstances the second question does not arise and I propose to declare that the income pending the birth of a son to Aubrey Hatfeild is payable to the personal representatives of Cuthbert Hatfeild.

Declaration accordingly.

Solicitors: *Rivington & Son; Payne, Hicks, Beach & Co.; Rivington & Son.*

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[17] [1894] 3 Ch. 30, 46; 10 T.L.R. 496.

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July 15, 16.

Harman J.

C. A.

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Oct. 3, 4.

Jenkins, Parker and Pearce L.JJ.

INLAND REVENUE COMMISSIONERS *v.* WOOD BROS. (BIRKENHEAD) LTD. (IN LIQUIDATION).

Revenue—Income tax—Balancing charge—"Actual income"—Whether balancing charge part of "actual income" for company surtax purposes—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323.

Revenue—Surtax—Company.

The taxpayer, a company to which section 245 of the Income Tax Act, 1952, applied, ceased trading on April 28, 1951, and went into voluntary liquidation on April 16, 1952. The period over which the company had to be taxed was April 30, 1950, to April 16, 1952, inclusive.

It was not disputed that a balancing charge of £18,675 fell to be made on the company in respect of sales of plant and machinery on cessation of its business under section 292 (1) and section 323 (4) of the Income Tax Act, 1952, and that the actual income of the company from all sources, as computed for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, for the said period fell to be apportioned among its members under sections 245 and 248 of the Income Tax Act, 1952. On appeal by the Crown from a decision of the Special Commissioners that the amount of the balancing charge did not fall to be included in the actual income from all sources for the purposes of Chapter III of Part IX of the Income Tax Act, 1952.

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Harman J. held that the money received from the sales of plant and machinery was capital in the company's hands and not income at all; and that, even though the balancing charge should be deemed to be income, the company had never had any "actual" income in its coffers in respect thereof; and that, accordingly, the balancing charge did not fall to be included in the company's actual income from all sources for the purposes of Chapter III of Part IX of the Income Tax Act, 1952.

On appeal:—

Held, (1) that the fact that the amount of the balancing charge was arrived at by means of a capital calculation did not necessarily conclude the question as to its character for income tax purposes, but it did not in itself bear the character of income at all.

(2) That the word "actual" in the phrase "the actual income "from all sources" meant the income for the actual period in respect of which the assessment in question was made.

(3) That the circumstance that the balancing charge was not actual income, meaning thereby income in the literal or real sense of the word, but if it was income at all was a sum to which the character of income had been notionally attributed by the legislation, would not necessarily exclude it from the calculation of the company's total income from all sources.

(4) That, nevertheless, it was necessary to find somewhere in the relevant provisions of the Act a sufficiently clear and unambiguous provision to the effect that the amount of the balancing charge should be deemed to be an addition to the income of the company for the period in question; and that no provision could be found which provided that such a sum was to be deemed income in the hands of the company.

Thomas Fattorini (Lancashire) Ltd. v. *Inland Revenue Commissioners* [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328 applied.

Kirkness (Inspector of Taxes) v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 All E.R. 345; sub nom. *John Hudson & Co. Ltd.* v. *Kirkness,* 36 T.C. 28 and *Townsend* v. *Electrical Yarns Ltd.* [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918; 33 T.C. 166 considered.

Decision of Harman J. affirmed in the result.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

On June 12, 1956, Wood Bros. (Birkenhead) Ltd. (in liquidation), the taxpayer, appealed against a direction and apportionment made by the Special Commissioners dated March 11, 1955, in pursuance of powers conferred on them by sections 245 and 248 of the Income Tax Act, 1952, directing that the actual income of the company from all sources, as computed for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, for the period April 30, 1950, to April 16, 1952, inclusive, should be

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apportioned among its members. The grounds of the appeal were that the amount of the actual income of the company so computed was excessive inasmuch as it included £18,675 in respect of a balancing charge. The facts found by the Special Commissioners on the hearing of the appeal were as follows.

The company sold its business of wholesale grocers and ceased trading on April 28, 1951. On April 16, 1952, it went into voluntary liquidation. It was not disputed that a balancing charge fell to be made on the company in respect of sales of plant and machinery on cessation of its business under sections 292 (1) and 323 (4) of the Income Tax Act, 1952, which was correctly computed at £18,675.

The accounts of the company for the year ended April 28, 1951, were not certified by their auditors until May 7, 1952. It was common ground that the whole period from April 30, 1950, to April 16, 1952, inclusive, was the period from the end of the last year for which accounts of the company had been made up to the time of the commencement of the winding up within the meaning and for the purposes of section 253 of the Income Tax Act, 1952. It was also not disputed that the actual income of the company from all sources, as computed for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, for that period fell to be apportioned among its members under sections 245 and 248 of that Act. Excluding the balancing charge of £18,675, this amounted to £57,589.

It was contended by the company that the amount that fell to be apportioned among its members under sections 245 and 248 of the Income Tax Act, 1952, was its actual income from all sources for the period April 30, 1950, to April 16, 1952, and that the amount of the assessment on the company in respect of the balancing charge did not fall to be included in that actual income.

The Inland Revenue contended that the amount of the balancing charge was correctly included in the computation for the purpose of arriving at the actual income from all sources within the meaning of Chapter III of Part IX of the Income Tax Act, 1952.

The Special Commissioners determined that the balancing charge assessed on the company did not fall to be included in the actual income of the company from all sources for the purposes of Chapter III of Part IX of the Income Tax Act, 1952.

The Crown appealed.

John Senter Q.C. and *Alan Orr* for the Crown. The first question in this case is whether the amount of £18,675 which was the subject of a balancing charge assessment to income tax is part of the company's " actual income from all sources " within section 245 of the Income Tax Act, 1952. The income tax assessment was admittedly correctly made on this amount and therefore it would be surprising if that sum were not actual income. To find the answer to this question one must investigate the nature and history of balancing charges. A trading company has income that is called profits and gains; these are computed for income tax purposes by making deductions. That is the amount of the company's profits or gains of the trade as computed, but that is not the amount on which the trader pays tax, because he gets wear and tear allowances, which are given to him in *charging* the profits and gains of his trade. Since 1945 a new concept has been introduced as to a trader. If he sells at a profit plant or machinery on which he has received wear and tear allowances, then the past allowances are shown to have been excessive and the Revenue will bring the amount of those excessive allowances (which have never lost the character of profits and gains) into charge. If that be right, a balancing charge imposes a charge by means of an assessment to income tax on the profits and gains of a trade and it is, therefore, actual income within section 245 of the Income Tax Act, 1952. Donovan J.'s remarks in *Townsend* v. *Electrical Yarns Ltd.*[1] are obiter. To say that section 292 (1) of the Income Tax Act, 1952, is not a charging section on the profits and gains of a trade is to conflict with *Kirkness* v. *John Hudson & Co. Ltd.*[2] A balancing charge operates as a recoupment by bringing back profits and gains into charge that have been " franked " in the past by the allowances made in charging the profits and gains.

The next question is whether the commissioners were right in their construction of sections 245 and 255 (3). The Crown's submissions are: (1) The reference in section 245 to " actual " income from all sources " means the total amount of its income from each source on which a company actually suffers income tax (hereinafter called the " statutory income "). (2) Section 255 (1) is a computing provision to determine in respect of each period and source the actual income, and it must be construed in accordance with the meaning attributed to the expression " statutory " income " as used in section 245 in the Crown's first submission.

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[1] (1952) 33 T.C. 168, 170.

[2] [1955] A.C. 696; [1955] 2 All E.R. 345.

(3) Accordingly, section 255 (3) is concerned with the final computation of the statutory income in such a way as to be applicable to income from all sources. (4) In particular, the expressions "computing," "computation" and "computed" as used in section 255 (3) do not bear the meaning to be given to these or similar expressions as used in the provisions relating to computation of profits and gains under Case I of Schedule D. (5) The amount of £18,675 included in the "actual income from all "sources" in the direction under section 245 and apportionment under section 248 was correctly included as part of the actual income from all sources for the period April 30, 1950, to April 16, 1952. (6) The said amount was chargeable and assessable as actual income from the company's trade in accordance with the submission of the Crown on balancing charges (see above). (7) To determine the said amount for the purpose of the computation under section 255 (3) the provisions that fall to be applied are sections 292 (1) (3) and (4), 297 and 333 (1) of the Income Tax Act, 1952.

Philip Shelbourne for the taxpayer company. There are two main propositions: (1) Section 245 of the Income Tax Act, 1952, is dealing with actual, i.e., distributable income. (2) A balancing charge is a charge on proceeds of sale of a capital asset and is not, therefore, actual income.

As to (1), it is important that the income should be actual, i.e., distributable, because a test in terms of a reasonable distribution has to be applied to it: see section 245 and also *Penang and General Investment Trust Ltd.* v. *Inland Revenue Commissioners.*[3] If it is not actual income, that is, if it cannot be distributed, the reasonableness of the company's policy in relation to distributing it cannot be tested.

With regard to (2), balancing charges are imposed on the proceeds of sale of capital assets and never give rise to a profit, i.e., income. Balancing charges appear in Part X of the Act dealing with capital expenditure. Section 292 (1) is a charging section. It falls to be read with sections 292 (3), 301, 323, 325 (1) and (2), and authorizes an assessment on the profits and gains of the trade for the year of assessment in the basis period for which the event giving rise to the balancing charge—in this case the sale—takes place.

Two small examples of the working of the Act are as follows: (i) A company buys a lathe for £500. Capital allowances of £200 are received under sections 279 (1) and 280, leaving expenditure unallowed at £300. The lathe is later sold for £350 and a balancing charge is made on £50 under sections 279 (1) and 280. There has been no profit but an actual loss of £150. There is no income and nothing that is distributable. (ii) Another lathe is bought for £500; capital allowances worth £200 are received, leaving expenditure unallowed at £300. The lathe is sold for £600 and a balancing charge is made on £200. The profit is £100; it is not taxed but it is distributable. Therefore, in a real sense, a balancing charge gives rise to (*a*) tax on proceeds of sale and (*b*) tax on something that can never give rise to a profit. The true nature of a balancing charge is stated in *Townsend* (*Inspector of Taxes*) v. *Electrical Yarns Ltd.*[4]; it is an additional assessment notionally made on profits and gains. It is not actual income as "computed" for income tax purposes under section 255 (3) of the Income Tax Act, 1952. The provisions for *computing* income are to be found in Part V of the Income Tax Act, 1952. Part X is concerned with *charging* income.

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[3] [1943] A.C. 486; 59 T.L.R. 237; [1943] 1 All E.R. 514; 25 T.C. 219.

The legislature showed in relation to profits tax that if it meant to treat balancing charges as income or profits it said so in express terms: see Finance Act, 1947, Sch. VIII, Part I, para. 2 (1). The taxpayer can rely on this expression of legislative intention in construing section 245. Further, the existence of the profits tax legislation reveals the absence of any mechanical provisions in the Income Tax Act for including balancing charges in the actual income of a particular year.

The nature of actual income for the purposes of section 245 was stated in *Lord Howard de Walden* v. *Inland Revenue Commissioners*[5] by Asquith L.J. and Lord Uthwatt. It was to be in some real sense "capable of distribution." A balancing charge does not satisfy this test and it cannot, therefore, be included in the company's actual income.

HARMAN J. The taxpayer company was a company to which section 245 of the Income Tax Act, 1952, applied. That section repeats section 21 of the Act of 1922, which imposed surtax on the undistributed income of certain companies, of which this was one. The question between the parties is whether, for the purpose of calculating what I may call the surtax income of the respondent company, a balancing charge of some £19,000 ought to be treated as part of the company's actual income. The Crown contends that it should, and, therefore, that it should be treated as part of that income for apportionment among the members of the company in order that they may be surtaxable on it. The company contends that it should not be so treated, and with that view the Special Commissioners agreed.

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[4] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918; 33 T.C. 166.

[5] (1948) 30 T.C. 345, 363, 369; [1948] 2 All E.R. 825.

The facts are extremely small in compass, and clear. The company ceased trading on April 28, 1951, and sold its plant and machinery. It went into liquidation on April 16, 1952. At that time no accounts had been made up within the meaning of the Income Tax Acts since April 30, 1950. Therefore, the period over which the company had to be taxed was the period from April 30, 1950, to April 16, 1952.

The company having gone into liquidation, it follows from section 253 of the Income Tax Act, 1952, that the income of the company over the relevant period, i.e., April, 1950, to April, 1952, is to be deemed to be income of that period available for distribution to the members of the company. On the facts of this case it was conceded that the Special Commissioners did not have to consider whether or no a reasonable amount had been distributed. In this case the controversy is, what was the actual income of the company for the period in question? That has been agreed, except for this matter of the balancing charge which was levied on the company. In order that the balancing charge should be part of the income of the members, it must be part of the actual income from all sources for the period of the company, and, therefore, the matter to be considered (and I think the only matter) in this case is what is the nature of the balancing charge.

A balancing charge was first imposed by the Income Tax Act, 1945, and was subsequently embodied in the Income Tax Act, 1952, by section 292. At the relevant period that section had not been altered as it was soon to be by the Finance Act, 1952. One must, therefore, look at the Act as it stood before it was altered. Section 292 provides that where any machinery and plant in respect of which various allowances have been made is sold, a balancing charge or a balancing allowance shall arise. A balancing allowance is something allowed to the company where it turns out that the annual allowances and the initial allowance have not been sufficient to equate the written down value for income tax purposes of the plant in question, with the proceeds of sale. An allowance is made to the taxpayer if he proves to be out of pocket. On the other hand, if he proves to be in pocket a charge is made against him. That is the balancing charge in this case. The machinery and plant was sold by the respondent company and gave rise to a balancing charge of some £19,000.

At first sight, it seems extraordinary that it should be suggested that a charge upon the company—that is to say, a subject-matter on which tax is to be levied—should be the actual income of the company. I find it hard to see how that which was a liability on the company could yet be part of its income. One finds that Part X of the Income Tax Act, 1952, deals with reliefs for capital expenditure; it follows that the expenditure in respect of which the reliefs are given was capital expenditure. One starts, therefore, with this: that the company spent capital on plant and machinery. It received under Part X an initial allowance and annual allowances against the capital expenditure, and those were allowed against the income of the company year by year. It is said, therefore, and this is true, that a corresponding part of the company's profits for that reason did not pay the tax which would otherwise have been levied upon them. When the sale produces an excess, the balancing charge is levied under section 292. Section 292 (3) provides: "If the sale . . . moneys "exceed the amount, if any, of the said expenditure still "unallowed as at the time of the event, a balancing charge shall "be made, and the amount on which it is made shall be an "amount equal to the excess." Subsection (4) puts a ceiling on that whereby the amount on which a balancing charge is made cannot exceed the amount of the initial allowance plus the amount of the annual allowances in respect of the machinery or plant in question. The charge is made as provided in section 301, which provides that any charge made on any person under the preceding provisions of the chapter shall be made on that person in charging the profits or gains of his trade. In other words, if a charge is made, tax on it is charged together with tax on the profits of the trade. If an allowance is made, it is allowed by deducting it from the profits or gains of the trade. The method of charging the tax is regulated by section 323 (4): "Any charge "falling to be made under any of the provisions of this Part of "this Act on a person for any year of assessment in charging "the profits or gains of his trade [that links up with section 301] "shall be made by means of an assessment on the profits or "gains of that trade for that year of assessment in addition to "any other assessment falling to be made thereon for that year." As a result of the assessment, there is a figure on which, together with the other assessment for the year, tax is chargeable under section 323. However, the fact that tax is chargeable in that way does not convert part of the moneys received by the company from the sale of a capital asset into the company's income. The company did not have that sum in its coffers as income at any time. It received a certain sum of money for that machinery and plant; that was capital in the company's hands. If it was in excess of the cost of the plant, the excess might be the subject-matter of a capital profit, available for dividend. The respondent contends that to say that so much as is liable to a charge in favour of the Crown because excessive allowances have been made becomes, thereby, income, is something which has no warranty in the Act at all; and that there is nothing to convert capital into income.

The Crown's argument, as I understand it, is this: This is in fact a recoupment to the Crown of money allowed to the subject in excess of what should have been allowed. Those allowances were made by way of tax allowances. The result of them was that the company kept in its coffers profits which would otherwise have been subject to tax. Therefore, when the company comes into possession of the excess, the effect is to bring back into the balance sheet for tax purposes those profits which had been franked by the allowances made for the earlier years. Therefore, it should be regarded as if these profits were brought back, the frank being removed by the act of sale, and, therefore, they are profits chargeable to tax and are quasi profits or gains of the company. That argument, though attractive, seems to me altogether to leave out the key word "actual." The company never had this income in its coffers; it had some proceeds of sale. As I see it, it never had any actual income. Supposing this had been a case where it was for the commissioners to ascertain under section 245 of the Income Tax Act, 1952, whether there had been a distribution in the year of a reasonable part of the actual income of the company. It is inconceivable that they should or could have taken this balancing charge into account, because no part of it was ever a distributable part of the company's income. It was never, in fact, part of the company's income at all, and, therefore, no part of its actual income. It might, in certain circumstances, be treated as or deemed to be the company's income, but that is not what the Act is talking about; it is talking about "actual income," and not a fictitious or supposed income.

Lord Uthwatt, in *Lord Howard de Walden* v. *Inland Revenue Commissioners*,[1] seems to me to have given voice to that very matter. Lord Uthwatt, dealing with what is now section 245,

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[1] (1948) 30 T.C. 345; [1948] 2 All E.R. 825.

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said [2]: " Thirdly, the direction to the commissioners is to decide " at the outset whether a reasonable part of the actual income of " a particular company has been distributed. It would be more " than curious if in that task they were to direct their minds to " an arithmetical total composed of income which is capable of " distribution and of 'deemed income' (such deemed income " being merely a figure—not even a book entry) which is incapable of distribution. In a case where company No. 2 owned " nothing but shares in company No. 1, the arithmetical total to " be considered might well be only 'deemed income.' My Lords, " for myself I am content to take the view that, in light of the " context, the words 'actual income' can mean only income " which is in some real sense capable of distribution. Apart from " that context, indeed, the phrase 'actual income' is hardly apt " to include fictional income; and non-existent income composed " of amounts deemed to be income is fictional income."

I think the present case is stronger than that. In this case there was a book entry of a receipt; there was no receipt in any income sense at all. These were receipts of proceeds of sale of machinery on a part of which this tax was levied, the part on which it was levied being charged. I do not think that the tax charged was income tax, although it was levied by an assessment and dealt with on income tax principles as if it were part of the profits or gains of the company. Therefore, if in answer to the question " Was this actual income? " it was found to be only income, if at all, in an extremely rarified and fictional sense, the only question in this case has been answered.

There is some authority in a decision of Donovan J., *Townsend* v. *Electrical Yarns Ltd.*,[3] where he was deciding something just the opposite to this, because there the company, for purposes of its own, was contending that the balancing charge which had been made upon it ought to be added to its annual taxable profits or gains in order to bring them above a certain figure and so deprive the Crown of an option which it would otherwise have had. Donovan J. said [4]: " In other words, the effect of the " balancing charge is to cancel allowances previously given for " capital loss through wear and tear, where that loss is recouped " to the taxpayer on a sale of his machinery." That is a very good and succinct description of what a balancing charge is. Then he dealt with section 323 (4), which I have read, and the words "by means of an assessment on the profits or gains of "that trade." He said[5]: "Do these words require that the "balancing charge must be levied as the company contends? "If so, it would seem also to follow that in a year for which a "balancing charge has to be made, but in which there are no "profits or gains of the trade to be taxed, no balancing charge "can be made at all. Or, on the contrary, do the words merely "define the kind of assessment by which the balancing charge "is to be levied? In considering this problem it has to be "remembered that the balancing charge falls to be made because "by the sale of his plant and machinery the taxpayer has "recouped the capital loss in respect of which he was previously "given a wear and tear allowance. That is the whole purpose "of the balancing charge and there is therefore no reason whatever "why the effective levy of the charge should depend upon "whether there are profits or gains of the trade, or, as in this case, "upon the amount of them." Later he said[6]: ". . . bearing "in mind that the purpose of section 17 and section 55 [of the "Income Tax Act, 1945] is clearly to levy a balancing charge on "£600, I am faced with the problem whether the words in section "55, 'by means of an assessment on the profits or gains of "'the trade' mean literally that there must be an assessment "on such profits; that is, do they describe what the result of the "assessment is to be, or are they descriptive merely of the kind "of assessment the legislature had in mind? I think the latter "is the true interpretation." And so do I. I do not quite share the judge's views as to how he arrived at that, but it seems to me that the fact that tax is to be levied on the profits or gains of his trade does not make the balancing charge part of those profits or gains. It clearly is not the profits or gains of the trade, and there is an end of it.

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[2] 30 T.C. 345, 370.

[3] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918; 33 T.C. 166.

[4] 33 T.C. 168.

If there were doubt in the matter, I think a passage in the speech of Lord Reid in *Kirkness* v. *John Hudson & Co. Ltd.*[7] would resolve it. The question there was whether there had been a sale within the meaning of a certain section. He said[7]: "I find nothing in the Income Tax Act, 1945, to justify "giving to the word 'sale' a meaning wider than its ordinary "meaning. In a taxing Act, and particularly in a charging "section, one assumes that language is used accurately unless "the contrary clearly appears, and, in my opinion, section 17 is "a charging section. It is the only section which could authorise

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[5] 33 T.C. 168, 170.

[6] Ibid. 171.

[7] [1955] A.C. 696, 729; [1955] 2 All E.R. 345.

"the assessment in this case. It is true that its provisions may "sometimes favour the taxpayer by entitling him to a balancing "allowance. But that does not prevent it from being a charging "section as regards those whom it makes liable to pay tax, and "'no tax can be imposed on the subject without words in an "'Act of Parliament clearly showing an intention to lay a burden "'on him.'"

It seems to me that this section 292, to which Lord Reid was there referring, so far as it did lay a burden on the taxpayer, is a charging section and must be construed, as it is said, "strictly." I am not sure that I have ever understood what the words "construed strictly" mean. One construes the words. It does mean this, I suppose: that if one is in doubt, the taxpayer is entitled to the benefit of the doubt. But, after all, the words I have to construe are the two words "actual income." You might ask 100,000 people whether a balancing charge levied on the company was its "actual income," and every one of them would say, "No, because it is not income at all." It is a charge, and a charge can only become income in the extremely ingenious arguments of Mr. Senter, to whom I am much indebted; but I do not feel I ought to accept anything so refined and put on the taxpayer a liability to which otherwise he could not be liable.

In my judgment the Special Commissioners came to a right conclusion in this case, and, accordingly, I propose to dismiss the appeal.

Appeal dismissed.

P. P.

The Crown appealed.

John Senter Q.C., *E. B. Stamp* and *Alan Orr* for the Crown. The sole issue is whether the amount upon which this income tax assessment was made, admittedly correctly, fell to be included in the "actual income of the company from all sources," that being the expression used in section 245 of the Income Tax Act, 1952. The Crown's case rests on the fact that income tax was levied, admittedly correctly, on the sum of £18,675 against the company for a particular year of assessment. The question therefore arises, if this sum of £18,675 is not *income*, why was income tax, admittedly correctly, levied upon it?

The concept of a balancing charge is explained by Lord Morton in *Kirkness (Inspector of Taxes)* v. *John Hudson & Co.*

Ltd.[1] In order to restore to the public revenue the amount by which past allowances are shown to be excessive, an additional assessment is brought on the profits of the trade. The *Kirkness* case [2] is authority for the proposition that section 292 is a charging section authorizing a charge to income tax. No question arises in the present case, as it did in *A. & J. Mucklow Ltd.* (*in liquidation*) v. *Inland Revenue Commissioners*,[3] as to the onus of proving that the company has acted unreasonably in withholding income from distribution. The sole question at issue is whether the amount in respect of which a balancing charge assessment was made is to be included in "actual income." [Reference was made to sections 245, 248, 292, 324 and 325 (1) of the Income Tax Act, 1952.] The fact that the amount of the balancing charge is arrived at by means of a capital calculation, the profit realized by the sale of the machinery and plant in question, does not necessarily conclude the question as to its character for income tax purposes: see the observations of Lord Macnaghten in *London County Council* v. *Attorney-General*[4] and of Lord Buckmaster in *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners*.[5]

As to what constitutes "actual income," Harman J. was wrong in holding that it is confined to income in the popular sense and does not include notional income. The observations of Scott L.J. in the Court of Appeal [6] and of Lord Atkin in the House of Lords [7] in *Thomas Fattorini* (*Lancashire*) *Ltd.* v. *Commissioners of Inland Revenue*,[8] a decision to which Harman J. was not referred, made it plain that the word "actual" in the phrase "the actual income from all sources" means the income for the actual period for which the assessment is made. In other words, "actual' is used in relation to time and not to the actuality of receipts. Accordingly, section 245 is concerned with the "income tax income" or the statutory income of the actual period in question and no other, whatever measure is used in arriving at such income.

In the present case the appropriate yardstick is provided by section 255 (3). The word "computing" there used must be construed (1) so as to arrive at the company's income tax income or the income on which it actually suffers income tax; (2) the said expression must be given a meaning which is generally applicable, since it is dealing with income from all sources, and it would be wrong to restrict its meaning to cases of profits or gains arising under Cases I and II of Schedule D.

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[1] [1955] A.C. 696, 716; [1955] 2 All E.R. 345; sub nom. *John Hudson & Co. Ltd.* v. *Kirkness* (*Inspector of Taxes*), 36 T.C. 28.

[2] Ibid.

[3] [1954] Ch. 615; [1954] 2 All E.R. 508; 35 T.C. 251.

[4] [1901] A.C. 26, 35; 17 T.L.R. 131; 4 T.C. 265.

[5] (1922) 12 T.C. 427, 463.

[6] 24 T.C. 328, 340.

[7] [1942] A.C. 643, 657.

[8] [1942] A.C. 643.

It is plain from the observations of Lord Morton in the *Kirkness* case [9] that the making of a balancing charge is an income transaction and the amount in respect of which the charge is authorized, and such a charge is assessed as income of the company by virtue of the combined effects of sections 292, 301 (1) and 323 of the Act of 1952. Accordingly, this sum of £18,675 was chargeable and assessable as actual income from the company's trade and was correctly included as part of " the actual income " from all sources " for the period April 30, 1950, to April 16, 1952. To determine the said amount for the purposes of the computation under section 255 (3), the provisions which fall to be applied are sections 292 (3), 333 (1), 297 and 292 (4). The resulting computation is the amount on which the balancing charge is levied. [Reference was also made to *Howard de Walden (Lord)* v. *Inland Revenue Commissioners* [10]; *Thompson* v. *Trust and Loan Co. of Canada* [11]; *Endowment Co. Ltd.* v. *Inland Revenue Commissioners* [12]; *Canadian Eagle Oil Co. Ltd.* v. *The King* [13]; *Townsend (Inspector of Taxes)* v. *Electrical Yarns Ltd.* [14]]

Philip Shelbourne and *Michael Nolan*, for the taxpayer company, were not called upon to argue.

JENKINS L.J. This is an appeal by the Commissioners of Inland Revenue from a judgment of Harman J. dated July 16, 1957, whereby he affirmed a determination of the Special Commissioners in favour of the taxpayer concerned, namely, a company called Wood Brothers (Birkenhead) Ltd.

There is no dispute as to the facts, which are sufficiently dealt with in the case stated and in the judgment of the judge, and I need only refer very briefly to the essential points. It is common ground that this company was a company amenable to the provisions relating to surtax on undistributed income of certain bodies corporate now to be found in Chapter III of Part IX of the Income Tax Act, 1952. It is further common ground that under these provisions, in the events which have happened, it is proper that the income of the company should be apportioned amongst its members. It is further not in dispute that the accounts of the company were last made up for the period ending April 29, I think it is (though it sometimes seems to be stated as April 30), 1950; so that the relevant period for the present, the company having gone into liquidation, is the period from April 29 or 30, 1950, to the date of the commencement of the winding up, namely, April 16, 1952. Furthermore, all figures are agreed between the parties and the appeal involves one point and one point only.

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[9] [1955] A.C. 696, 716.

[10] [1948] 2 All E.R. 825; 30 T.C. 345.

[11] [1932] 1 K.B. 317; 48 T.L.R. 209; 16 T.C. 394.

[12] (1929) 14 T.C. 353.

[13] [1946] A.C. 119; 61 T.L.R. 577; [1945] 2 All E.R. 499; 27 T.C. 205.

[14] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918; 33 T.C. 166.

The company contends that the proper amount of income liable to be apportioned to the members is £57,589. The commissioners do not dispute that figure, as a figure, but they say that a further sum ought to be included, namely, a sum of £18,675, being the amount of a balancing charge which became chargeable under the relevant provisions of Part X of the Act of 1952, which re-enacted in substance provisions formerly to be found in the Finance Act, 1945.

There is no dispute that the case is one in which it is proper for a balancing charge to be made, and there is no dispute as to the figure of £18,675, the point at issue being simply whether the amount of that balancing charge is part of the company's actual income from all sources for the relevant period so as to make it proper to be included in the figure of income to be apportioned amongst the members.

I should next refer to some of the provisions of the Act, beginning with the leading provisions on the matter of surtax on undistributed income of companies. The familiar section 245, formerly section 21 (1) of the Finance Act, 1922, is in these terms: "With a view to preventing the avoidance of the pay-"ment of surtax through the withholding from distribution of "income of a company which would otherwise be distributed, it "is hereby enacted that where it appears to the Special Com-"missioners that any company to which this section applies has "not, within a reasonable time after the end of any year or other "period for which accounts have been made up, distributed to "its members, in such manner as to render the amount distri-"buted liable to be included in the statements to be made by "the members of the company of their total income for the "purposes of surtax, a reasonable part of its actual income from "all sources for the said year or other period, the Commissioners "may, by notice in writing to the company, direct that, for "purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, "be deemed to be the income of the members, and the amount "thereof shall be apportioned among the members."

Then section 248 provides, by subsection (1): "Where a direction has been given under section two hundred and forty-five "of this Act with respect to a company, the apportionment of "the actual income from all sources of the company shall be "made by the Special Commissioners in accordance with the "respective interests of the members." Then there are machinery provisions with which I need not trouble. I can go to section 253, which deals with the case of a company in liquidation. That provides, by subsection (1): "Where an order "has been made or a resolution passed for the winding up of a "company to which section two hundred and forty-five of this "Act applies—(*a*) the income of the company for the period "from the end of the last year or other period for which accounts "of the company have been made up to the time of the commencement of the winding up shall, for the purposes of the "said section, be deemed to be income of that period available "for distribution to the members of the company; and (*b*) as "respects that period, and the next preceding year or other "preceding period or periods ending within that next preceding "year for which accounts have been made up, the said section "shall apply as if the words 'within a reasonable time' were "omitted therefrom."

That provision admittedly applies to the company, as does section 245, and the income in question is the actual income of the company from all sources from the date to which its accounts were last made up down to the commencement of the winding up.

Finally, I should refer to a definition in section 255 (3). That subsection is in these terms: "In computing, for the purposes "of this Chapter, the actual income from all sources of a company "for any year or period, the income from any source shall be "estimated in accordance with the provisions of this Act relating "to the computation of income from that source, except that the "income shall be computed by reference to the income for such "year or period as aforesaid and not by reference to any other "year or period."

Pausing there, it follows that the balancing charge in the present case cannot be included in the income for apportionment amongst the members unless it is within the terms of this definition part of the actual income of the company from all sources for the relevant year or period, and it is in effect round this definition and its implications that the argument in this appeal has centred.

To reach a view on the question whether the balancing charge bears the character of actual income of the company from any source for the period in question, so as to bring it within the definition and make it a proper subject of apportionment, it is necessary to consider the provisions of the Act relating to allowances and charges of the kind here in question.

This elaborate legislation as to allowances and charges in respect of machinery and plant was, as I have said, originally enacted by the Income Tax Act, 1945, and it is now to be found in Part X of the Act of 1952. There have been some amendments which do not, I think, touch this case.

Section 279 provides: " (1) Subject to the provisions of this Act " and, in particular, subject to the provisions of subsection (5) of " this section, where a person carrying on a trade incurs capital " expenditure on the provision of machinery or plant for the " purposes of the trade, there shall be made to him, for the year " of assessment in the basis period for which the expenditure is " incurred, an allowance (in this Chapter referred to as ' an " ' initial allowance ') equal to "—then a fraction is mentioned—" of the expenditure." The fraction seems to have been altered by subsequent legislation, but it was under the Income Tax Act, 1952, two-fifths and has since been reduced to one-fifth [section 16 (2) (*a*) of the Finance Act, 1953]. Nothing, however, turns upon that.

Then section 280 deals with annual allowances: " Subject to " the provisions of this Act, where the person carrying on a trade " in any year of assessment has incurred capital expenditure on " the provision of machinery or plant for the purposes of the " trade, an allowance (in this Chapter referred to as ' an annual " ' allowance ') shall be made to him for that year of assessment " on account of the wear and tear of any of the machinery or " plant which belongs to him and is in use for the purposes of " the trade at the end of the basis period for that year of " assessment." The basis period, I should perhaps mention, is defined in section 325, and that provides: " (1) In this Part of " this Act, ' basis period ' has the meaning assigned to it by the " following provisions of this section." I do not think I need go into those provisions, as in the present case the relevant period is the actual period with which we are concerned.

The next section to which I need refer is section 292. That appears under the cross-heading "Balancing Allowances, "Balancing Charges, etc.," and it provides, by subsection (1) (I am reading the section as it originally stood): "Subject "to the provisions of this section, where any of the following "events occurs in the case of any machinery or plant in "respect of which an initial allowance or an annual allowance "has been made for any year of assessment to a person carrying "on a trade, that is to say, either—(*a*) the machinery or plant "is sold, whether while still in use or not; or (*b*) the machinery "or plant, whether still in use or not, ceases to belong to the "person carrying on the trade by reason of the coming to an "end of a foreign concession; or (*c*) the machinery or plant is "destroyed; or (*d*) the machinery or plant is put out of use as "being worn out or obsolete or otherwise useless or no longer "required, and the event in question occurs before the trade is "permanently discontinued, an allowance or charge (in this "Chapter referred to as 'a balancing allowance' or 'a balancing "'charge') shall, in the circumstances mentioned in this section, "be made to, or, as the case may be, on, that person for the "year of assessment in his basis period for which that event "occurs: . . ." Then subsection (2): "Where there are no "sale, insurance, salvage or compensation moneys or where the "amount of the capital expenditure of the person in question "on the provision of the machinery or plant still unallowed as "at the time of the event exceeds those moneys, a balancing "allowance shall be made, and the amount thereof shall be the "amount of the expenditure still unallowed as aforesaid, or, as "the case may be, of the excess thereof over the said moneys." Then subsection (3): "If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said "expenditure still unallowed as at the time of the event, a "balancing charge shall be made, and the amount on which it is "made shall be an amount equal to the excess or, where the said "amount still unallowed is nil, to the said moneys. . . ." Then subsection (4): "Notwithstanding anything in subsection (3) of "this section, in no case shall the amount on which a balancing "charge is made on a person exceed the aggregate of the following amounts, that is to say—(*a*) the amount of the initial "allowance, if any, made to him in respect of the expenditure "in question; and (*b*) the amount of any annual allowance made "to him in respect of the machinery or plant in question"; and certain other matters which I need not enter into. The subsection imposes a ceiling or maximum designed broadly to recoup the amount of the allowances in cases where the losses which they represent have been more than offset by the sale of the plant or machinery.

Then section 301 provides, by subsection (1): "Any allowance or charge made to or on any person under the preceding "provisions of this Chapter shall, unless it is made under or by "virtue of subsection (2) of section two hundred and ninety-six "of this Act, or under or by virtue of section two hundred and "ninety-eight of this Act, be made to or on that person in "charging the profits or gains of his trade."

Section 323, which is the last one to which I need refer, provides, by subsection (1): "Any claim by a person for "an allowance falling to be made to him under any of the "provisions of this Part of this Act in charging the profits or "gains of his trade shall be included in the annual statement "required to be delivered under this Act of the profits or gains "thereof, and the allowance shall be made as a deduction in "charging those profits or gains." Subsection (4): "Any charge "falling to be made under any of the provisions of this Part of "this Act on a person for any year of assessment in charging the "profits or gains of his trade shall be made by means of an "assessment on the profits or gains of that trade for that year "of assessment in addition to any other assessment falling to be "made thereon for that year."

Those are all the statutory provisions on this matter of balancing allowances and balancing charges to which I need refer. In the present case, the company in fact ceased business on April 28, 1951, and at or about the same time it sold the plant or machinery. As appears from what I have already said, this was a case in which allowances had been made. I think an initial allowance was made (I am not sure if that is positively found in the case) and there were annual allowances, and the sale of the plant and machinery realized an excess of the proceeds as compared with the amount of the depreciation or capital loss allowed for, and consequently the excess became the subject of a balancing charge.

The judge rejected the appeal of the Commissioners of Inland Revenue in effect, I think, on two grounds. First, he said that the amounts expended or losses incurred in relation to plant or machinery were capital losses, and any profit realized on the sale of the plant and machinery was in like manner a capital profit, and he said no question of income arose in this case at all. There was simply a figure which might be regarded as a capital gain realized on the sale of the plant and machinery, and in his view, on this aspect of the case, if the amount of the capital gain had been made by the legislation a subject for charge to income tax, it was in fact tax on something which was not income at all but was capital.

Mr. Senter, for the commissioners, combated that view by reference, amongst other cases, to *London County Council* v. *Attorney-General*[1] for the well-known statement of the law by Lord Macnaghten. Lord Macnaghten said: "Income tax, if I "may be pardoned for saying so, is a tax on income. It is not "meant to be a tax on anything else. It is one tax, not a "collection of taxes essentially distinct. There is no difference "in kind between the duties of income tax assessed under "Schedule D and those assessed under Schedule A or any of "the other schedules of charge. One man has fixed property, "another lives by his wits; each contributes to the tax if his "income is above the prescribed limit. The standard of assess-"ment varies according to the nature of the source from which "taxable income is derived. That is all. Schedule A contains "the duties chargeable for and in respect of the property in all "lands, tenements and hereditaments capable of actual occupa-"tion. There the standard is annual value. It is difficult to "see what other standard could have been adopted as a general "rule. But there again, if the subject of charge be lands let at "rack-rent, the annual value is 'understood to be the rent by "'the year at which the same are let.' In every case the tax "is a tax on income, whatever may be the standard by which "the income is measured."

Mr. Senter used that passage to show that income for income tax purposes may be the subject of a notional or conventional measurement, and that in the present case the balancing charge might well be income for tax purposes, although its amount was arrived at by reference to a figure of capital gain. To the same end, Mr. Senter also referred to a passage from *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners*.[2] The case concerned a sum received by a company which operated pits of fireclay in consideration of their permanently discontinuing the winning of fireclay in a particular place. The question was, as I understand it, whether the sum paid there was income for

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[1] [1901] A.C. 26, 35; 17 T.L.R. 131; 4 T.C. 265.

[2] (1922) 12 T.C. 427, 463.

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income tax purposes, and Lord Buckmaster said: "It is unsound "to consider the fact that the measure, adopted for the purpose "of seeing what the total amount should be, was based on considering what are the profits that would have been earned. "That, no doubt, is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the "compensation payable in such circumstances is the full value "of the minerals that are to be left unworked, less the cost of "working, and that is, of course, the profit that would be "obtained were they in fact worked. But there is no relation "between the measure that is used for the purpose of calculating "a particular result and the quality of the figure that is arrived "at by means of the application of that test. I am unable to "regard this sum of money as anything but capital money, and "I think therefore it was erroneously entered in the balance sheet "ending August 31, 1913, as a profit on the part of the Fireclay "Company."

So far, I agree with Mr. Senter that the fact that the amount of the balancing charge is arrived at by means of a capital calculation does not necessarily conclude the question as to its character for income tax purposes, as it seems to me that a sum so calculated may well be income for those purposes if the relevant legislation declares it to be such. But it clearly cannot be said in itself to bear the character of income at all.

The other line of reasoning which appealed to the judge was based, in effect, on section 255 (3) of the Act. If I might read that again: "In computing, for the purposes of this Chapter, "the actual income from all sources of a company for any year "or period, the income from any source shall be estimated in "accordance with the provisions of this Act relating to the computation of income from that source, except that the income "shall be computed by reference to the income for such year or "period as aforesaid and not by reference to any other year or "period." The judge naturally attached great importance to the word "actual" both in that passage and in section 245 and other sections dealing with surtax on undistributed income of companies. The judge took the view that "actual income" meant, as I understand him, income in the popular sense of that expression, as opposed to fictional or notional income, and he concluded that the amount of the balancing charge could not be said to be part of the actual income of the company.

If "actual" is used in the sense accorded to it by the judge, that is to say, the real or the true, as opposed to the hypothetical or fictitious or notional, income, then his view, I think, would clearly be right. But light is thrown upon the meaning of the word "actual" in a case to which the judge was not referred. That was *Thomas Fattorini (Lancashire) Ltd.* v. *Commissioners of Inland Revenue.*[3] I can go straight to the passages in the judgments of Scott L.J. and of Lord Atkin in the House of Lords, on which Mr. Senter relied. Scott L.J. said[4]: "It was contended for the company that its 'actual income' "(within the meaning of section 21) for the two years in question "consisted solely of the dividends receivable on the whole of "the shares in the three operative companies; that, in the "circumstances, the actual income and the dividends meant in "fact the same thing, so that apparently the company had "contracted itself out of the whole of its 'actual income.' But "that statement of the position is only a half-truth. The dividends, no doubt, constituted the company's gross receipts, but "not its 'income' for income tax purposes; the interest paid "to the bank, for instance, had to be deducted from the gross "receipts. But if by the contention it was intended to base "an inference of fact that the company possessed no assets out "of which it could raise money, to take the place of income "which it had found it convenient to devote to a capital purpose, "with a view to declaration of dividend, the facts do not support "the inference."

Then the Lord Justice said[5]: "Our reasons are these. The "judgment of Rowlatt J. attached a meaning to the expression "'actual income' with which we disagree. He treated it as "connoting the receipts side only of the income account. He "assumed that if the actual receipts in the statutory year mentioned in section 21 had been assigned or hypothecated under "a binding contract, the company's 'actual income' had passed "out of its control and, therefore, ceased to be available for "distribution. This, in our opinion, is an error. The true "meaning of the phrase, we think, is indicated by the context, "and by certain provisions of the Act of 1918. 'Income tax . . . "'is a tax on income . . . whatever may be the standard by "'which the income is measured.'"—that, of course is a reference to Lord Macnaghten's speech in *London County Council* v. *Attorney-General*,[6] to which I have already referred—"and "the phrase 'profits and gains' in income tax legislation is, at

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[3] [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328.

[4] 24 T.C. 328, 340.

[5] Ibid. 340, 342.

[6] [1901] A.C. 26, 35; 17 T.L.R. 131; 4 T.C. 265.

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"any rate under Schedule D, no more than a synonym for "'income.' For purposes of assessment the income of an "anterior period was and is 'deemed to be the income' of the "person charged for the year of assessment; he is charged on "a conventional or putative, and not the actual income; till 1927 "it was an average of three years; since then it has been of the "preceding year." Then he goes on to deal with the case of super-tax, the total income in that case also falling to be ascertained on the previous year's basis, and he refers to some of the provisions dealing with that. He goes on [7]: "Finally, rule 8 "of the rules applicable to Cases I and II of Schedule D, "reproducing section 24 of the Finance Act, 1907, but repealed "by the Finance Act, 1926, provided that where '*the actual* "'profits or gains,' i.e., the income, '. . . in the year of "'assessment fall short of the profits or gains as computed in "'accordance with this Act, he shall be entitled to be charged "'on the *actual* amount of the profits or gains so arising, "'instead of on the amount of the profits or gains so computed.' "That rule, in the Act of 1918, we think, supplies the key to "the meaning of the word 'actual' in section 21 of the Act "of 1922, which called for interpretation in the *Glazed Kid* "case [8] and calls for it in the present case. It was inserted to "make it clear that it is not the conventional, but the de facto "income of the year in question which is the subject to the duty "to distribute. The epithet 'actual' in such a sense is illustrated "in income tax law by the Finance Act, 1907, s. 24, subss. (2) "and (3), where the successor to a continuing business and his "predecessor who ceases to carry it on, is taxed on his 'actual "'income' in the two broken periods of the year. The fact "that the word is used in that sense in income tax legislation "still in force in 1922 seems to us conclusive."

Lord Atkin said [9]: "It will be convenient here to deal with "the argument which was pressed on us by Mr. Donovan that "in the present case the dividends from the operative companies' "shares formed the whole of the 'actual' income of the company "within the meaning of section 21 of the Act of 1922, and that, "as the whole of that 'actual' income had been assigned to the "bank, there was no part of it which could have been distributed. "My Lords, the Court of Appeal have effectively disposed of this "argument. Actual income does not mean the specific receipts "that come in from time to time, but the 'income tax income'

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[7] 24 T.C. 328, 342, 343.

[8] (1930) 15 T.C. 445.

[9] [1942] A.C. 643, 657.

" as calculated at the end of the year of assessment. To hold " otherwise would make nonsense of the section when applied " to commercial companies, who use their receipts as soon as " they come in, and hardly ever have left for distribution the " actual incomings as sought to be defined in the argument."

I accept Mr. Senter's submission that the observations of the court in that case make it reasonably plain that we should treat the word " actual " here in the phrase " the actual income " from all sources " as meaning the income for the actual period in respect of which the assessment is made, as distinct from the income from some other basic period of a conventional kind such as the previous year or, as it once was, the three years average selected as the basis of calculation; and, that being referable to that matter, the word " actual " does not have the restrictive effect which Harman J. attributed to it. Accordingly, the circumstance that the balancing charge was not actual income, meaning thereby income in the literal or real sense of the word, but if it was income at all was a sum to which the character of income had been notionally attributed by the legislation would not necessarily exclude it from the calculation of the company's total income from all sources. But that does not conclude the matter, for, even so, it is necessary to my mind to find somewhere in the relevant provisions of the Act some sufficiently clear and unambiguous provision to the effect that the amount of the balancing charge shall be deemed to be an addition to the income of the company for the period in question. It seems to me that Mr. Senter, notwithstanding his detailed and careful argument, has not succeeded in doing that. I find nothing to say that this particular sum is to be deemed to be income in the hands of the company.

I would refer, in that connexion, once more to section 323, and I refer to that because of what appears to me to be a somewhat significant change of language which is to be found when one compares the terms of subsection (4) with the terms of subsection (1). Subsection (1) deals with allowances, and it says: " Any claim by a person for an allowance falling to be " made to him under any of the provisions of this Part of this " Act in charging the profits or gains of his trade shall be " included in the annual statement required to be delivered under " this Act of the profits or gains thereof, and the allowance " shall be made as a deduction in charging those profits or " gains." One would have thought that in the case of a charge if it had been so intended the converse would have been provided for, and the amount of the balancing charge would have been directed to be added to the amount of the profits or gains; but subsection (4) is not so framed, and it provides: "Any charge "falling to be made under any of the provisions of this Part "of this Act on a person for any year of assessment in charging "the profits or gains of his trade shall be made by means of "an assessment on the profits or gains of that trade for that "year of assessment in addition to any other assessment falling "to be made thereon for that year." There is to be an assessment on the profits or gains of that trade for that year, in addition to any other assessment falling to be made thereon for that year, but there is nothing that I can see which says that the amount of a balancing charge must be added to the amount of profits or gains. It is true that there is to be a surcharge on profits or gains to the extent of the balancing charge, but that does not to my mind involve the conclusion that the balancing charge becomes part of the actual income from all sources for the relevant period. No doubt it must be brought in in some way for the purposes of calculation, but it does not follow from that that it must be treated as part of the company's income for all purposes.

There were other authorities to which Mr. Senter referred, and in particular *Kirkness* (*Inspector of Taxes*) v. *John Hudson & Co. Ltd.*,[10] which is of interest because it discussed these very provisions which at that time were to be found in the Act of 1945. The question there was, as I understand it, whether a balancing charge was payable by reason of the compulsory acquisition of railway wagons belonging to a certain company, so that the actual matter which had to be decided was whether a compulsory acquisition of the kind that had taken place there was a sale within the meaning of the legislation dealing with balancing charges; but views were expressed on the character of the Act by Lords Morton and Reid, to which Mr. Senter referred us. Lord Morton said[11]: "The Act of 1945 greatly "extended the scheme of capital allowances for depreciation of "capital assets, for the purpose of the taxation of the profits "of business undertakings; a special feature of such allowances "was the making of an initial allowance upon the acquisition "of the asset, in addition to subsequent annual allowances. The

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[10] [1955] A.C. 696; [1955] 2 All E.R. 345; sub nom. *John Hudson & Co. Ltd.* v. *Kirkness* (*Inspector of Taxes*), 36 T.C. 28.

[11] [1955] A.C. 696, 716.

" object of the provisions contained in section 17 (1) (*a*) is, I " think, plain. The legislature realized that machinery or plant " might be sold before the trader had obtained the full amount " of the depreciation allowances which might have accrued in " respect thereof, and the moneys received on the sale might " be less than the written-down value of the asset. This would " indicate that the depreciation allowances had not been suffi- " ciently generous in this particular instance, and by way of " putting the matter right a ' balancing allowance ' became " claimable by the trader. Conversely, if the moneys received " on the sale were in excess of the written-down value of the " asset, a ' balancing charge ' was imposed, in order to restore " to the public revenue the amount by which the past allowances " were shown to have been excessive."

Then there was this passage in the judgment of Lord Reid. He said[12]: " I find nothing in the Income Tax Act, 1945, to " justify giving to the word ' sale ' a meaning wider than its " ordinary meaning. In a taxing Act, and particularly in a " charging section, one assumes that language is used accurately " unless the contrary clearly appears, and, in my opinion, section " 17 is a charging section. It is the only section which could " authorize the assessment in this case. It is true that its " provisions may sometimes favour the taxpayer by entitling " him to a balancing allowance. But that does not prevent " it from being a charging section as regards those whom it " makes liable to pay tax, and ' no tax can be imposed on " ' the subject without words in an Act of Parliament clearly " ' showing an intention to lay a burden on him.' " Then he refers to Lord Blackburn's observation in *Coltness Iron Co.* v. *Black.*[13] " It may be that there is no apparent reason why the " taxpayer should be subject to a balancing charge or entitled " to a balancing allowance if his plant is sold, but not if it is " taken compulsorily, but ' if the Crown, seeking to recover the " ' tax, cannot bring the subject within the letter of the law, " ' the subject is free, however apparently within the spirit of the " ' law the case might otherwise appear to be.' "

In contradistinction to that passage from Lord Reid's judgment, Lord Morton had expressed the view that this was not a charging section. He said[14]: " It is true that in one event " the section imposes a charge upon the subject, but it is equally

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[12] [1955] A.C. 696, 716, 729.

[13] (1881) 6 App.Cas. 315, 330.

[14] [1955] A.C. 696, 723.

"true that in another event it confers a benefit upon him, and "the words 'is sold' must bear the same meaning in each "event. In these circumstances, I do not think that the "principle of strict construction of a charging section can be "applied in this case."

Those passages do not appear to me really to afford much assistance in the present case, and I share the difficulty expressed by Harman J. in applying the principle that a charging section or charging provision must be strictly construed. All one can do is to construe the provisions of any enactment according to their tenor as best one can. If they are advanced to the court as imposing some charge, the court rightly requires that the intentions of imposing a charge should be expressed in clear terms; and if there is, in truth, any ambiguity, it should be resolved against the person seeking to set up the charge. But really this comes to very little more than saying that provisions imposing charges, like any other statutory provisions, must be construed according to their language.

Mr. Senter attached some importance to the passage from Lord Morton's judgment which I have just read where he said at the conclusion of the passage[15]: "a 'balancing charge' "was imposed, in order to restore to the public revenue the "amount by which the past allowances were shown to have "been excessive." Mr. Senter says that, bearing that principle in mind, this emerges clearly as an income transaction, the position in a case such as this being that events, as they ultimately turn out, show that the taxpayer has been accorded relief from income tax on the strength of losses which in the end of all do not materialize or are fully recouped by the sale of the plant or machinery in relation to which the allowances are given. The position then is that the taxpayer has paid too little tax, and the provisions dealing with balancing charges are designed to rectify that. The balancing charge thus appears as an item invested with the character of income, introduced into the assessment to income tax of the given taxpayer so as to rectify the underpayment due to the allowances made in past years. That line of argument is attractive, but it suggests that the intention enacted would have been better carried out by provisions enabling assessments for past years to be re-opened and for the adjustment to be made year by year. Be that as it may, this argument, while it indicates the policy of these statutory provisions, does nothing so far as I can see to carry the case of the commissioners any further on the question whether the balancing charge is part of the actual income from all sources of the company. Accepting what was said by Scott L.J. on the meaning of "actual" in this context, I still find it necessary that it should be shown that by some express statutory provision this notional item represented by the balancing charge is to be deemed for income tax purposes to be income of the company. Finding no such provision, I think it necessarily follows that the appeal here fails.

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[15] [1955] A.C. 696, 716.

We were referred to various other authorities, but none, I think, really has any bearing on this matter, with the exception of *Townsend* (*Inspector of Taxes*) v. *Electrical Yarns Ltd.*,[16] which was a case heard by Donovan J., the facts being quite different from those in this case. Donovan J. came to the conclusion that the amount of the balancing charge ought not to be included in the profits of the year in which it was to be charged, and he regarded that assessment as a separate matter from the ordinary assessment. Accordingly, he seems so far to have taken very much the same view as I have done on the question of the balancing charge.

For the reasons I have endeavoured to state, I think this appeal fails and should be dismissed.

PARKER L.J. I entirely agree, and there is nothing which I can usefully add.

PEARCE L.J. I also agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, Inland Revenue; Simmons & Simmons for March, Pearson & Green, Manchester.*

J. A. G.

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[16] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918; 33 T.C. 166.

1958
Feb. 11, 12.

Danckwerts J.

In re RICHARDSON'S WILL TRUSTS.
PUBLIC TRUSTEE *v.* LLEWELLYN EVANS' TRUSTEE.

[1957 R. No. 1289.]

Trust and Trustee—Protective trust—Forfeiture clause—Maintenance charged on protected interest by order of court—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 33.

Husband and Wife — Maintenance — Divorce — Secured payments — Whether order effects equitable charge—Maintenance charged on protected interest—Whether forfeited.

A testator bequeathed to his grandson, who later became bankrupt, a protected interest in a settled legacy under which he was entitled to the income during his life and until he attained the age of 35 years, when the interest become absolute, provided that he had not "attempted to do or suffer any act or thing or any "event has happened . . . whereby he would then or at any time "thereafter be deprived of the right to receive the capital or "income or any part thereof . . ." but that "if he has made "such attempt or sufferance or such event has happened" then the trustees were to hold the income thereof on protective trusts for his benefit during his life in accordance with section 33 of the Trustee Act, 1925.

On the petition of the bankrupt's wife a decree absolute of divorce was made against him on November 15, 1954; and by an order of the Divorce Division, dated June 3, 1955, an annual payment of £50 for her benefit was charged on his interest under his grandfather's will and it was ordered that "the deed necessary "to give effect to the said charge be settled by conveyancing counsel "of the court."

No such deed was ever executed. On October 24, 1955, the bankrupt attained the age of 35 years. On August 27, 1956, he was adjudicated bankrupt.

On a summons to determine the effect of the order of June 3, 1955, on the bankrupt's protected interest under the will, his trustee in bankruptcy contended that the order did not create a forfeiture of that interest:—

Held, that on the footing that the order was not completed by the execution of a deed, its effect was to create an equitable charge on the bankrupt's interest, and accordingly there was a forfeiture of the interest under the express terms of the will, and the trustee of the will held the property during the rest of the bankrupt's life on the discretionary trusts laid down in section 33 of the Trustee Act, 1925.

Hyde v. *Hyde* [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R 362 applied.

ADJOURNED SUMMONS.

This summons raised the question whether a forfeiture had arisen of the protected life interest of Douglas William Llewellyn

Evans, who was now a bankrupt, under the will, dated July 5, 1930, of his grandfather, John Billingsley Richardson, who died on March 22, 1935, having regard to two orders made respectively in 1954 and 1955 in divorce proceedings between the bankrupt and his wife.

By his will the testator gave £2,000 3 per cent. local loan stock to his trustees "upon trust to invest the same and to hold "the income from the investments for the time being representing "the same on protective trusts for the benefit of my grandson "Douglas William Llewellyn Evans during his life and until he "attains the age of 35 years in accordance with section 33 of "the Trustee Act 1925 [1] and on his attaining the age of 35 years "provided that he has not attempted to do or suffer any act or "thing or any event has happened (other than any advance under "any statutory or express power) whereby he would then or at "any time thereafter be deprived of the right to receive the "capital or income or any part thereof to pay the capital and "income to the said Douglas William Llewellyn Evans absolutely and if he has made such attempt or sufferance or such "event has happened then I direct the said trustees to hold the "income thereof on protective trusts for the benefit of the said "Douglas William Llewellyn Evans during his life in accordance "with section 33 of the Trustee Act 1925 and if the said Douglas

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[1] Trustee Act, 1925, s. 33: "(1) "Where any income . . . is directed "to be held on protective trusts for "the benefit of any person (in this "section called 'the principal beneficiary') for the period of his life "or for any less period, then, during "that period (in this section called "the 'trust period') the said income "shall, without prejudice to any prior "interest, be held on the following "trusts, namely:—(i) Upon trust for "the principal beneficiary during the "trust period or until he . . . does "or attempts to do or suffers any "act or thing, or until any event "happens, other than an advance "under any statutory or express "power, whereby, if the said income "were payable during the trust period "to the principal beneficiary absolutely during that period, he would "be deprived of the right to receive "the same or any part thereof, in "any of which cases, as well as on "the termination of the trust period, "whichever first happens, this trust "of the said income shall fail or "determine; (ii) If the trust aforesaid fails or determines during the "subsistence of the trust period, then, "during the residue of that period, "the said income shall be held upon "trust for the application thereof for "the maintenance or support, or "otherwise for the benefit, of all or "any one or more exclusively of the "other or others of the following "persons (that is to say)—(*a*) the "principal beneficiary and his or her "wife or husband, if any, and his "or her children or more remote "issue, if any; or (*b*) if there is no "wife or husband or issue of the "principal beneficiary in existence, "the principal beneficiary and the "persons who would, if he were "actually dead, be entitled to the "trust property or the income thereof . . . as the trustees in their "absolute discretion . . . think fit."

"William Llewellyn Evans shall die before attaining the age of "35 years or the protective trusts for his benefit after his attaining that age shall come into operation then on his death I direct "the said trustees to hold the capital and income of the trust "fund upon trust for such of his children who shall attain the "age of twenty-one years equally between them and if there be "one such child then the whole to that one child . . ."

That contingent interest was represented in the present summons by David Byatt Seymour Llewellyn Evans, infant son of Douglas William Llewellyn Evans.

In divorce proceedings between Douglas William Llewellyn Evans and his wife, a decree absolute of divorce was made on the petition of the wife against him on November 15, 1954. On October 13, 1954, an order had been made in the Probate, Divorce and Admiralty Division "That the respondent [that was Douglas "William Llewellyn Evans] do secure to the above-named "petitioner for her life until further order as from the date upon "which the decree nisi herein be made absolute, the annual gross "sum of £50 upon security to be agreed or referred to a registrar." The materiality of that order was that maintenance of £50 per annum was fixed by it.

Subsequently, on June 3, 1955, the order was made which it was contended operated to create a forfeiture of Douglas William Llewellyn Evans' interest. By that order it was ordered "that "the above named respondent do charge his interest under the "will of his grandfather Dr. John Billingsley Richardson with the "payment of £50 per annum interim maintenance directed to be "secured by the respondent in favour of the petitioner pursuant "to the said order dated the 13th day of October, 1954, and that "the deed necessary to give effect to the said charge be settled "by conveyancing counsel of the court." No such deed was ever settled.

On October 24, 1955, Douglas William Llewellyn Evans attained the age of 35 years. On August 20, 1956, a receiving order was made against him, and he was adjudicated bankrupt on August 27, 1956. His trustee in bankruptcy was the first defendant.

The public trustee (who was the sole trustee of the trusts of the will) took out the present summons to have determined: (1) Whether, on the true construction of the testator's will and in the events which had happened, the trust property representing the settled legacy (a) vested for an absolute beneficial interest in Douglas William Llewellyn Evans on his attaining the age of

35 years on October 24, 1955, and accordingly was now held by the plaintiff upon trust for the first defendant, as trustee in bankruptcy of Douglas William Llewellyn Evans; or (b) by reason of the order of June 3, 1955, he forfeited his interest therein. (2) If the answer to 1 (b) be in the affirmative, whether the plaintiff had since the date of the order held the said trust property (a) during the life of Douglas William Llewellyn Evans on the discretionary trusts provided for in section 33 (1) (ii) of the Trustee Act, 1925 (being the principal beneficiary in relation thereto), and after his death as to capital and income thereof upon the trusts in the testator's will expressed then to take effect if the protective trusts for his benefit after his attaining the age of 35 years should come into operation; or (b) upon some other trusts.

Andrew Goodall for the plaintiff, the Public Trustee.

P. S. A. Rossdale for the trustee in bankruptcy of Douglas William Llewellyn Evans. This order did not work a forfeiture. The will says "whereby"; the forfeiture was not, however, to be "by" the order of the Divorce Division, but "by" the contemplated deed. The order itself declared that the contemplated deed was necessary to give effect to it; no such deed was ever executed. The bankrupt was not therefore deprived of his income within the meaning of the forfeiture clause in the will.

The necessity for a deed to give effect to the order derives from the cases under the Matrimonial Causes Act, 1857, when there was only secured maintenance. Thus in *Waterhouse* v. *Waterhouse* [2] the court made an order that the maintenance should be secured as a charge on the respondent's property, and granted an injunction to restrain him from parting with it until effect was given to that order. Similarly, in *Newton* v. *Newton* [3] the husband was ordered to secure a sum as maintenance for the wife for which a deed should be drawn up by one of the conveyancing counsel of the Chancery Division, and the judge granted an injunction restraining the husband from dealing with his property until the execution of the deed. It appears from those cases that the order of the Divorce Division securing maintenance was not effective until the parties executed it, and therefore injunctions were granted pending effect being given to the order of the court. That would not have been necessary if the order itself operated as a charge: see *Sidney* v. *Sidney*.[4]

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[2] [1893] P. 284.

[3] [1896] P. 36; 12 T.L.R. 65.

[4] (1867) 17 L.T. 9.

This order, therefore, did not work at all until a deed was duly settled and executed; if that had been done a forfeiture would have arisen. *In re Salting* [5] is clear authority that mere payment by the bankrupt himself of the maintenance payable under the order of June 3, 1955, would not have involved a forfeiture. The order, on the evidence before the court on this summons, involved no forfeiture. There being no deed to give effect to this order, it is ineffective, and until the deed is executed the bankrupt is entitled to the income from this interest.

Certain authorities contain dicta contrary to the above propositions: see *Maclurcan* v. *Maclurcan*,[6] *Hyde* v. *Hyde* [7] and *Mosey* v. *Mosey and Barker* [8]; the distinction is that this is a case of a protected interest when it is impossible to execute an effective deed under the order of the Divorce Division.

It is clear on the face of this order that its object is to do something for the benefit of the wife—it starts with a charge of securing maintenance for her—but the court would not make an absurd order, namely, an order which would have the effect of destroying the interest which it intends to secure. The order creates a personal duty on the bankrupt to execute a deed; it was dated June 3, 1955, and on October 7 of that year he obtained an absolute interest on his attaining 35 years of age. The order was intended, therefore, to operate in a way in which effect could be given to it, that is, on his acquiring an absolute interest he should have a conveyance executed. If the order created a forfeiture, it would have the absurd intention of depriving the wife of any security she might have, which was obviously contrary to its plain intention.

A form of precedent similar to that in Key and Elphinstone's Conveyancing Precedents, 15th ed., vol. 2, p. 588, could have been adopted.

No payments have been made under this order; and an interest subject to similar provision for forfeiture was held in *In re Mair* [9] not to be forfeited, since no effect had been given to the agreement which might have caused the tenant for life to be deprived of her protected interest. In *In re Longman* [10] it was decided that in order to work a forfeiture there must be evidence that payments were made which operated to divest the interest.

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[5] [1932] 2 Ch. 57.

[6] (1897) 77 L.T. 474.

[7] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

[8] [1956] P. 26; [1955] 2 All E.R. 391.

[9] [1909] 2 Ch. 280.

[10] [1955] 1 W.L.R. 197; [1955] 1 All E.R. 455.

[DANCKWERTS J. I do not think that I went quite so far as that; I only said there that no payment was ever made.]

Finally, it is desired to found an argument on the construction of sections 40 and 42 of the Bankruptcy Act, 1914, that the bankruptcy was within two years of the order.

[DANCKWERTS J. Is that argument open to you in these proceedings?]

It is submitted yes, but, if not, I wish to protect myself against the suggestion that I have abandoned the point that any such deed would have been void against the trustee under sections 40 and 42, and being void could not effect a forfeiture.

A. C. Sparrow for David Byatt, son of the bankrupt, an infant. My submissions fall into two parts: (1) that the case should be decided as a matter of construction; and (2) that considerations that no deed was ever executed are without weight. On the question of construction, the words of the will are to be considered and not section 33 of the Trustee Act, 1925. For present purposes the forfeiture to be considered is that which arises from the words "provided that he has not attempted to "do or suffer any . . . thing . . . whereby he would then or at "any time thereafter be deprived of the right to receive . . . "income or any part thereof." The words of the will, which appear to be a borrowing from the Act of 1925, mean that if an event has happened by which the bankrupt would thereafter be deprived of the right to receive the income or any part of it, then there would be a forfeiture.

In *In re Baring's Settlement Trusts* [11] Morton J. held that a sequestration order on property under which income arising under a protected life interest was withheld from the tenant for life was a deprivation giving rise to a forfeiture. That was, if anything, a narrower case than the present. Morton J. said that the intention of the testator was either that the tenant for life should be in a position to deal with income or the discretionary trusts should arise. Here the bankrupt was not after the order in a position to deal with the whole of the income.

Secondly, it was said that it made some difference because the order could not be effective as no deed was executed by a conveyancing counsel. There is no warrant for that proposition. It may not be necessary for the court to find that there was any charge.

[DANCKWERTS J. It could be said that it was an attempt to charge.]

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[11] [1940] Ch. 737; 56 T.L.R. 777; [1940] 3 All E.R. 20.

There only has to be an event to destroy the bankrupt's right to receive the income or part of the income of the property; but even if this has to be a charge in order to work a forfeiture, the authorities are too strong for effect to be given to the contentions that this order did not operate as a forfeiture: *Waterhouse* v. *Waterhouse* [12] and *Maclurcan* v. *Maclurcan.*[13] *In re Salting* [14] was a very special case; there was a difference on the facts and it was plainly a condition that the order was only to come into operation on a special event.

[DANCKWERTS J. I am satisfied that the order would create an equitable charge.]

Reliance is put, first, on cases such as *In re Baring's Settlement Trusts,*[15] where an interest was held to be forfeited because of a sequestration order, and *In re Sartoris's Estate,*[16] where there was a receiving order, and, secondly, on the construction of the will.

There is a distinction where property was vested in some other person, but only as agent for the tenant for life: *In re Westby's Settlement.*[17] It was held in *In re Gillott's Settlement* [18] that an equitable assignment of income operated as a forfeiture although the income was not immediately payable thereunder; see also *In re Haynes Will Trusts,*[19] which followed the *Gillott* case.[20]

The effect of this order must be a forfeiture of the bankrupt's interest; to hold otherwise would be to run counter to *In re Baring's Settlement Trusts* [21] and *In re Sartoris's Estate.*[22]

Rossdale in reply on the cases. *In re Baring's Settlement Trusts* [23] is distinguishable because the sequestrators were there effectively ordered to pay income in a certain way; *In re Sartoris's Estate* [24] is distinguishable because the receiving order was effective; *In re Gillott's Settlement* [25] depended on an effective equitable assignment. Here the order has never become effective by the execution of the necessary deed.

DANCKWERTS J., having stated the facts, continued: In considering whether there has been a forfeiture, the first question is: What was the effect of the order of June 3, 1955, on the footing that it was never completed by the execution of any deed? The matter has been very well argued before me, and I have been taken through a number of cases. I am satisfied, upon three decisions, that clearly the effect of that order in itself was to create an equitable charge, if that were possible, upon the interest of Douglas William Llewellyn Evans under his grandfather's will. The cases in question are *Waterhouse* v. *Waterhouse*,[1] *Maclurcan* v. *Maclurcan*[2] and *Hyde* v. *Hyde*.[3] In the last of those cases Barnard J. applied what previously had been no more really than the dicta of the Court of Appeal in the *Waterhouse* case[4] and in *Maclurcan* v. *Maclurcan*[5] that an order referring to specific property, in the manner of this order which I have to consider, did upon its date create an equitable charge upon the property to which reference therein was made.

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[12] [1893] P. 284.
[13] 77 L.T. 474.
[14] [1932] 2 Ch. 57.
[15] [1940] Ch. 737.
[16] [1892] 1 Ch. 11; 8 T.L.R. 51.
[17] [1950] Ch. 296; 66 T.L.R. (Pt. 1) 515; [1950] 1 All E.R. 479.
[18] [1934] Ch. 97.
[19] [1949] Ch. 5; [1948] 2 All E.R. 423.
[20] [1934] Ch. 97.
[21] [1940] Ch. 737.
[22] [1892] 1 Ch. 11.
[23] [1940] Ch. 737.
[24] [1892] 1 Ch. 11.
[25] [1934] Ch. 97.

That being so, the next thing to consider is: What was the effect of that order which created that equitable charge? There are two portions of the will which involve the question of forfeiture. First of all, there is the part which invokes section 33 of the Trustee Act, 1925, before the grandson had attained the age of 35, and then the part which describes what is to happen upon his attaining that age. As to the first part, the trusts of the will before he attains the age of 35 years must be taken to be expressed in this form: "Upon trust for the principal "beneficiary"—that is, the grandson—"during the trust period "or until he . . . does or attempts to do or suffers any act or "thing, or until any event happens (other than any advance under "any statutory or express power) whereby, if the said income "were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of "the right to receive the same or any part thereof." It seems to me that the effect of the order was to create, or attempt to create, an equitable charge on his interest under the testator's will. When this order was made, if he had been absolutely entitled, he would have been deprived of the right to receive part of the income, because part of the income was to be payable to his former wife to the extent of £50 a year. Consequently, it seems to me that there was a forfeiture at that date; but in any case under the express terms of the will he never succeeded in attaining his absolute interest, and the protective trusts which were to take effect during the rest of his life in accordance with section 33 of the Trustee Act, 1925, came into effect because the direction was, if such event had happened, that the protective trusts were to come into effect, and the fund in question is referred to as the fund of which "he would then or at any time "thereafter be deprived of the right to receive the capital or "income or any part thereof." When, therefore, the order of the Divorce Division was made on June 3, 1955, an event happened whereby he would either then or at some time thereafter "be "deprived of the right to receive the capital or income" or any part of it.

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[1] [1893] P. 284.
[2] (1897) 77 L.T. 474.
[3] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.
[4] [1893] P. 284.
[5] 77 L.T. 474.

An argument was put forward on behalf of the trustee in bankruptcy that I must construe the order made by the registrar of the Divorce Division, in accordance with the numerous cases on the subject which have come before the court, in such a way as to give effect to the order and avoid any forfeiture. It was argued that the proper way to construe the order was as a direction that upon attaining the age of 35 years, then, and not until then, the charge was to be operated upon the interests of the grandson under his grandfather's will. It seems to me that I am unable to do that. I have to deal with the order as I find it. Undoubtedly, on its terms, and on the cases to which I have been referred in which orders of this kind have been construed in the Probate and Divorce Division, the effect of such an order is to attempt at any rate to create an immediate charge. Of course, the result of the forfeiture provision in the will is that that attempt is unsuccessful, but that is the way in which the forfeiture provisions in the will operate. An event operates by which—if only there had been an absolute interest taken by the person in question—he would have been deprived of the income; but, owing to the forfeiture provision followed by the discretionary trust, he is in fact not necessarily deprived of the income but has received discretionary payments from the trustees under the protective trusts which follow. Consequently, I have come to the conclusion that, in the events which have happened in this case, by the time that David William Llewellyn Evans became bankrupt his interest under the will had been forfeited, and a discretionary trust had come into effect. Consequently, the trustee in bankruptcy cannot take anything under the testator's will.

Mr. Rossdale, on behalf of the trustee in bankruptcy, wished to argue as to the effect of sections 40 and 42 of the Bankruptcy Act, 1914, on the order of June 3, 1955; but, in my view, it is not open to me to consider this matter in the absence of the bankrupt's former wife, and, accordingly, I express no opinion upon that matter at all.

I will make a declaration that by reason of the order dated June 3, 1955, the life interest of Douglas William Llewellyn Evans under the terms of the testator's will was determined, and that he did not become entitled to an absolute interest upon the attainment by him of the age of 35 years, and that on the true construction of the will, and in the events which have happened, during the life of Douglas William Llewellyn Evans, the plaintiff as trustee holds the trusts of the property during the rest of the life of Douglas William Llewellyn Evans and the income thereof upon the discretionary trusts laid down in section 33 (1) (i) of the Trustee Act, 1925, and after the death of the said Douglas William Llewellyn Evans as to the capital and income thereof upon the trusts in the testator's said will expressed then to take effect if the protective trusts for his benefit after his attaining the age of 35 years should come into operation.

Declaration accordingly.

Solicitors: *Joynson-Hicks & Co. for Turner, Turner & Sheldon, Torquay; Tarry, Sherlock & King; Kingsford, Dorman & Co. for Williamson & Barnes, Deal.*

I. G. R. M.

PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

[1957 P. No. 2057.]

1958
Feb. 4, 13.

Danckwerts J.

Revenue — Estate duty — Property chargeable — Property passing on death—Bequest to trustee for life of income from share of residue—" . . . so long as he shall act as . . . trustee . . . by way of " remuneration"—Duty claimed on death of trustee on capital of share—Whether exempted as income received " only . . . as holder " of an office"—Scope of exempting provisions—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

A testator gave to one of the trustees of his will the income from certain shares of his residuary estate "during his life so long

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PUBLIC TRUSTEE v. INLAND REVENUE COMMISSIONERS.

"as he shall act as executor and trustee of this my will by way of "remuneration for so doing . . ." On the death of the trustee, the Inland Revenue Commissioners claimed estate duty under section 1 of the Finance Act, 1894,[1] as property passing on the death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an office," and that it therefore came within the exemption from duty in section 2 (1) (*b*) of the Act:—

Held, allowing the claim to estate duty, (1) that the exemption in section 2 (1) (*b*) only applied in respect of property within the extended meaning given to property passing on the death in section 2, and had no application to duty payable under section 1.

Attorney-General v. *Milne* [1914] A.C. 765; 30 T.L.R. 476; *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270; and *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 1 All E.R. 14 considered.

Per curiam. From the cases the following propositions are deducible: (i) Section 1 of the Finance Act, 1894, is the charging section, and if a case falls within the terms of that section, it is unnecessary to refer to the including or extending provisions of section 2. (ii) None the less the restricting or excluding provisions to be found in subsections (2) and (3) of section 2 *do* affect cases which would fall within section 1.

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[1] Finance Act, 1894 (as amended), s. 1: "In the case of every person "dying after the commencement of "this Part of this Act, there shall, "save as hereinafter expressly pro-"vided, be levied and paid, upon the "principal value ascertained as here-"inafter provided of all property, real "or personal, settled or not settled, "which passes on the death of such "person a duty, called 'estate duty,' "at the graduated rates hereinafter "mentioned, and the existing duties "mentioned in the First Schedule "to this Act shall not be levied in "respect of property chargeable with "such estate duty."

S. 2: "(1) Property passing on the "death of the deceased shall be "deemed to include the property fol-"lowing, that is to say:—(*a*) Pro-"perty of which the deceased was at "the time of his death competent to "dispose; (*b*) Property in which the "deceased or any other person had "an interest ceasing on the death of "the deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but exclu-"sive of property the interest in "which of the deceased or other per-"son was only an interest as holder "of an office, or recipient of the "benefits of a charity, or as a cor-"poration sole; . . . (2) Property "passing on the death of the deceased "when situate out of the United "Kingdom shall be included only, if, "under the law in force before the "passing of this Act, legacy or suc-"cession duty is payable in respect "thereof, or would be so payable but "for the relationship of the person to "whom it passes. (3) Property pass-"ing on the death of the deceased "shall not be deemed to include pro-"perty held by the deceased as "trustee for another person, under "a disposition not made by the "deceased, or under a disposition "made by the deceased more than "five years before his death where "possession and enjoyment of the "property was bona fide assumed by "the beneficiary immediately upon "the creation of the trust and thence-"forward retained to the entire exclu-"sion of the deceased or of any "benefit to him by contract or "otherwise."

(2) That although the testator's appreciation of the qualities of the trustee was no doubt why he was selected as trustee, as he was only to receive this income so long as he acted as trustee and by way of remuneration for so doing, it could not be claimed that he had not received the income from these shares "only . . . as "holder of an office." The position of a trustee was an "office" within the meaning of section 2 (1) (*b*) of the Act.

Attorney-General v. *Eyres* [1909] 1 K.B. 723; 25 T.L.R. 298 and *Dale* v. *Inland Revenue Commissioners* [1954] A.C. 11; [1953] 2 All E.R. 671 applied.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment. This summons arose out of the provisions of the will of the late Viscount Northcliffe, and the question asked was whether on the death of Henry Preuss Arnholz (who was an executor and trustee of the will) estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which Arnholz was entitled immediately before his death under the terms of the will.

Lord Northcliffe made his will on March 22, 1919; he also made three codicils, but the provisions of them were not relevant on the present question. Lord Northcliffe died on August 14, 1922, and his will and codicils were duly proved on February 23, 1923, by the executors therein named.

By his will Lord Northcliffe appointed Arnholz (who was a solicitor) and Sir George Augustus Sutton to be the executors and trustees. By clause 6 of his will he devised and bequeathed his real and personal estate upon the usual trusts for conversion and the resulting residuary trust fund was directed to be held upon trust to pay the net income arising therefrom in each year in the shares and manner directed in the following paragraphs of clause 6. The direction in paragraph (26) was "As to three "equal one-hundredth parts of the said income to the said Henry "Preuss Arnholz during his life so long as he shall act as executor "and trustee of this my will by way of remuneration for so doing "and in addition to any professional charges which he may be "entitled to make in accordance with clause (23) of this my "will."

Paragraph (27) directed the payment of seven equal one-hundredth parts of the said income to Sir George Augustus Sutton during his life so long as he should act as executor and trustee of the will by way of remuneration for so doing and in addition to the specific legacy given him under clause 1 of the will.

By paragraph (28) Lord Northcliffe declared that on the failure (whether in his lifetime or afterwards) of each of the trusts declared respectively by sub-clauses (1) to (27) of that clause of the will the shares or share of income which were the subject of the trust which should have failed (including all additions thereto under the present provision) should be added to the income of such of the said trusts created by such sub-clauses (1) to (27) of clause 6 of the will as should not have failed and to the last one of such trusts when all but one should have failed and in every case except the last such addition to each trust should be in the proportion which the income then subject to that trust (including income accrued under this present provision) should at that date bear to the income then subject to the others or other of the said trusts which should not have failed (including income accrued under this present provision).

The division of the income into 100 shares was in fact upset by the addition of provisions for the payment of three more one-hundredth shares in the second codicil dated June 23, 1920. This difficulty was resolved by the decision of Russell J. on July 28, 1924, that the additional three shares be shared equally with the gifts in clause 6 of the will so that everyone took so many 1/103 shares instead of 1/100 shares.

By clause 10 of the will the capital of the residuary estate was dealt with by certain charitable gifts.

By clause 19 of the will the testator conferred very wide discretionary powers on his trustees, stating that it was his intention that the said Henry Preuss Arnholz, whom he had known since he was 10 years old, and the said George Augustus Sutton, whom he had known since the year 1890, both of whom were well acquainted with his wishes and intentions with regard to his estate, and in whose business capacity and fairness and integrity he had the fullest confidence, and other the trustees or trustee for the time being of his will should have the fullest freedom of action and the widest and most absolute and uncontrolled discretion in all matters whatsoever relating to the administration of his estate and the carrying out of the purposes of his will.

Sir George Augustus Sutton died on December 7, 1947. No claim to estate duty on the shares of the capital of the estate in respect of which he was receiving the income on the occasion of his death was made by the Inland Revenue Commissioners.

Arnholz died on August 31, 1955. Immediately before his death he was receiving the income of 3/49½ shares of capital of the residuary estate. On the occasion of his death a claim had been made by the Inland Revenue Commissioners that estate duty was payable on those shares of capital under the provisions of section 1 of the Finance Act, 1894.

The Public Trustee took out the present summons to have determined whether the claim by the commissioners to estate duty on Arnholz' death was correct.

John Pennycuick Q.C. and *J. A. Wolfe* for the Public Trustee. The claim to estate duty on the death of Arnholz in respect of his interest under the testator's will is resisted on the ground that he received it as " holder of an office " within the meaning of section 2 (1) (*b*) of the Finance Act, 1894, and it was accordingly excluded from " property in which the deceased . . . had an " interest ceasing " on his death on which estate duty was payable under that subsection.

Until the observations of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [2] it was thought that ordinary settled property passed, not under section 1 of the Act of 1894, but under section 2; that was finally set at rest in the *Cowley* case,[2] where it was held that settled property passed under section 1 and not under section 2 (1) (*b*). But Lord Macnaghten in that case went much further and said that sections 1 and 2 were mutually exclusive. In fact he went too far in so saying; if it were so, the exemption in subsections (2) and (3) of section 2 would have no effect in respect of property passing under section 1. Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [3] pointed out that Lord Macnaghten's dictum needed some qualification.

The position must be accepted that sections 1 and 2 are mutually exclusive in the sense that they relate to two different codes. Section 1 is the only charging section, and section 2 is not a charging section, but brings within the scope of the expression " property passing on the death " in section 1 certain categories of property which would not come within the natural meaning of those words and excludes certain categories which would come within the natural meaning of those words. It provides that certain specified categories of property in section 2 (1) shall in any event be treated as passing on the death, and on that view certain categories specified in section 2 overlap with certain categories of property passing under section 1.

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[2] [1899] A.C. 198; 15 T.L.R. 270.

[3] [1956] A.C. 491; [1956] 1 All E.R. 14.

The definition of "property passing on the death" was discussed by Lord Parker in *Attorney-General* v. *Milne*,[4] where he said that section 2 artificially enlarged the ambit of the expression "property passing on the death," but that it also artificially limited such ambit by expressly excluding certain kinds of property which did in fact pass on the death. The Court of Appeal in *In re Duke of Norfolk*[5] felt bound by the principles laid down by Lord Macnaghten in the *Cowley* case[6] to hold that, if property passed under section 1, that excluded the application of section 2.

Section 1 is to be regarded as the only charging section and section 2 as writing into that section certain categories of property which are deemed to be included or excluded from the expression "property passing on the death" whether or not they pass under section 1 or are brought in under section 2. The way in which that is done was stated by Lord Dunedin in *Attorney-General* v. *Milne*,[7] where he said that the expression "property which "passes" in section 1 must include property which was deemed to pass by virtue of section 2, subject to the exemptions contained in section 2, and that means the exemptions in section 2 (1) (*b*) of, inter alia, property to which the deceased was only entitled as holder of an office.

To come within this exemption in section 2 (1) (*b*) the interest of the deceased must, of course, have been only as the holder of an office. *Attorney-General* v. *Eyres*[8] is direct authority that the exemption in that subsection applies to the case of a trustee, and also shows that if Arnholz had been given an annuity instead of the shares in the income, section 2 (1) (*b*) would have applied and no duty would have been payable. Under the terms of the will Arnholz was entitled to receive the income so long as he held the office of trustee and "as remuneration for so doing," and it is impossible, therefore, to say that he held it other than as holder of an office. The duties of a trustee were said by the House of Lords in *Dale* v. *Inland Revenue Commissioners*[9] to be properly described as an "office of profit" where remuneration was attached to it by the testator who created the trusteeship. This interest represented income received by Arnholz from his office of trustee and only as holder of that office within the meaning of section 2 (1) (*b*).

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[4] [1914] A.C. 765; 30 T.L.R. 476.

[5] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[6] [1899] A.C. 198.

[7] [1914] A.C. 765.

[8] [1909] 1 K.B. 723; 25 T.L.R. 298

[9] [1954] A.C. 11; [1953] 2 All E.R. 671.

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown. For the purposes of this case it is conceded that trusteeship is an office, but *Dale* v. *Inland Revenue Commissioners* [10] was dealing with a differently worded statute; the words there were " any remuneration from any office "; here they are " property the interest in which . . . was only . . . as holder of " an office." The relevant case on whether Arnholz received this only as holder of an office is *Attorney-General* v. *Eyres*,[11] where an annual sum was given to trustees " while acting in the trusts " by way of remuneration for their services . . ." That case is distinguishable from the present in that Arnholz did not have the benefit just as holder of the office; it was given to him during his life so long as he should act as trustee; it was a purely personal gift by way of appreciation of his personal qualifications with a condition attached to it that he should act as trustee.

On the construction of the Act, the exception contained in section 2 (1) (*b*) is intended to be confined to the application of that subsection itself. It does violence to the way the statute is drafted to say that it has any significance other than as an exception to what is deemed to pass under section 2. Section 1 is, of course, the charging section, and section 2 is supplementary. If an interest passes under section 1, there is no need to consider whether it passes under section 2. Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [12] said that section 2 (1) gave to the word " passes " in section 1 a wider and less natural meaning than it would have had if section 2 (1) had not been enacted. Lord Radcliffe found this approach to the Act a more satisfactory method than that of dividing the property charged into two categories—property passing and property notionally passing. That does not, however, impinge on the proposition that if something does pass under section 1 it does not pass under section 2. Lord Macnaghten's opinion that sections 1 and 2 are mutually exclusive is binding on this court and the Court of Appeal.

Lord Dunedin in *Attorney-General* v. *Milne*,[13] in considering whether Lord Macnaghten was strictly correct in saying that the two sections were mutually exclusive, said that section 2 swept into the net various things which section 1 would have failed to secure. Those opinions are not inconsistent with one another, and there is nothing to throw any doubt on the principles laid

[10] [1954] A.C. 11.

[11] [1909] 1 K.B. 723.

[12] [1956] A.C. 491.

[13] [1914] A.C. 765.

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down by Lord Macnaghten. The case, in view of the decision in *In re Duke of Norfolk*,[14] must stand governed by Lord Macnaghten's opinion. Although it may have been that Lord Macnaghten went too far, and it has been said that he did, nevertheless his opinion has been followed and it stands as it has stood for 50 years. [*De Trafford* v. *Attorney-General*[15] was also referred to.]

Stamp following. On whether the interest which Arnholz held was, in the words of the subsection, "only an interest as "holder of an office," some significance must be given to the word "only," which the argument for the Public Trustee fails to do. If an interest is given to "the trustee for the time being" or to the town clerk of Birmingham for the time being, the interest is given to the person only as the holder of the office. A gift of an annual sum to the town clerk for the time being is different from a gift of an annual sum to A so long as he is town clerk. In construing section 2 (1) (*b*) one must ask whether it was an interest which Arnholz had only as holder of the office; if it was, there was no need to name the recipient, since his only qualification to receive the interest was because he was holder of the office.

Alternatively, on the question whether estate duty is excluded under the exemption in section 2 (1) (*b*), one has to consider whether the property which passes is charged with duty solely by the effect of section 1, or whether one has to have resort to section 2 (1) (*b*). If tax is chargeable solely by the operation of section 1, then the words of exclusion in that subsection do not apply; it is only where section 2 (1) (*b*) is relied on to bring in the property that the words of exclusion can apply; the exception in section 2 (1) (*b*) being only an exception to the operation of that subsection, it cannot as a matter of grammar apply where, as here, property is liable to duty under section 1.

Pennycuick in reply. The general relationship of sections 1 and 2 are not really disputed; it is accepted that they are mutually exclusive in that one does not have to have recourse to section 2 to ascertain whether it is within section 1. The words "property "following" in section 2 denotes property not passing under section 1. They are words of addition, and it is hoped to argue in the House of Lords that they are "words of extension." The effect of sections 1 and 2 (1) together is: (1) that duty is payable on property which actually passes, and (2) it is extended to property of which the deceased was competent to dispose or in which he had an interest ceasing on his death, whether or not it actually passes. Accepting that section 2 applies only to property which is not included in the ordinary scope of the words "property passing" in section 1, there is then the short question of construction whether, on the construction of sections 1 and 2 (1) together, the exemption in section 2 (1) (*b*) can be read into section 1. It is submitted that it should be so read and that that is a perfectly logical and possible construction of the Act. The construction for which the Crown contends would have illogical results; for instance, the interest in Church lands of an incumbent of a parish would pass under section 1 and be outside section 2 (1) (*b*), so that such lands would attract duty on his death.

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[14] [1950] Ch. 467.

[15] [1935] A.C. 280; 51 T.L.R. 298.

Cur. adv. vult.

February 13. DANCKWERTS J. read the following judgment, in which he stated the facts as set out above.

The claim to estate duty by the Inland Revenue Commissioners is substantial, as duty at the rate of 55 per cent., amounting to some £80,000, is claimed, and if the claim is well founded, duty at the same rate will be payable on Arnholz' comparatively small free estate of some £25,000.

[His Lordship read sections 1 and 2 (1) (*a*) and (*b*) of the Finance Act, 1894.]

Subsections (2) and (3) of section 2 are, however, limiting provisions, which appear to be of general application under the scheme of the Act. Subsection (2) excludes in effect from liability to duty property situate outside the United Kingdom unless legacy or succession duty would previously have been payable; and subsection (3) excludes generally property held by the deceased as trustee unless it falls within the provisions as to gifts.

It is contended on behalf of the Inland Revenue Commissioners that: (1) in any case the position of Arnholz does not come within the words of exclusion in section 2 (1) (*b*), and (2) the excluding provision in that subsection has no application to cases falling within section 1 of the Act.

It is not contested, as I understand, that the shares of the property passed on the death of Arnholz within the meaning of section 1.

The relationship of sections 1 and 2 of the Finance Act, 1894, has been the subject of discussions in a number of cases in the Court of Appeal and the House of Lords.

The view that sections 1 and 2 are mutually exclusive has been based on the remarks of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners*.[1] The short facts of the case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estate so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under section 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. The view taken in the Court of Appeal seems to have been that section 2 applied because the father's life interest ceased on his death. Lord Macnaghten pointed out[2] that in every case in which property comprised in a settlement passes on death the estate or other limited interest of the preceding owner must have ceased for good and all, and that the passing of settled property was specifically mentioned in section 1. Lord Macnaghten then proceeded to say (in an often quoted passage)[3]: "Now, if the case falls within section 1 "it cannot also come within section 2. The two sections are "mutually exclusive. Section 1 might properly, I think, be "headed, 'With regard to property passing on death, be it "'enacted as follows.' Section 2 might with equal propriety be "headed, 'And with regard to property not passing on death, "'be it enacted as follows.' I cannot, therefore, agree with "Rigby L.J. when he says that section 2 is a provision "'explanatory' of section 1. In my opinion the two sections "are quite distinct, and section 2 throws no light on section 1. "But, then, no doubt section 2 speaks of 'property in which "'the deceased . . . had an interest ceasing on the death of "'the deceased.' And that, it may be said, was just the position "of the second earl with regard to the Mornington settled "estates. So it was. But section 2 does not apply to an "interest in property which passes on the death of the deceased. "That is already dealt with in the earlier section."

The House, as a whole, were satisfied that the case fell within section 1 of the Act, though Lord Davey expressed an opinion that the same result was arrived at, whether the case fell within the first or the second section.

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[1] [1899] A.C. 198; 15 T.L.R. 270.

[2] [1899] A.C. 198, 212.

[3] Ibid.

Attorney-General v. *Milne*[4] related to a gift of property, which was caught by the provisions of section 2 (1) of the Finance Act, 1894, as amended by section 59 of the Finance (1909–10) Act, 1910. The question was whether the further settlement estate duty imposed by section 5 applied to property made subject to estate duty by the provisions of section 2. The decision of the House of Lords was that section 5 did not apply. Lord Haldane described section 2 as not a definition section but an independent section operating outside the field of section 1. Lord Dunedin, though he differed from the other members of the House as to the application of section 5, and, therefore, dissented, had some interesting remarks to make as to the relation of sections 1 and 2. He said[5]: " The paramount enacting section " of the Act is undoubtedly to be found in section 1. I need not " quote it. The duty which it is the object of the Act to levy is " imposed on property real and personal, settled or not settled, " which ' passes ' on the death of any person dying after the " commencement of the Act. Now, although the word ' passes ' " is what I may call a neutral or vague word, it is so naturally " associated with the idea of ' from ' and ' to,' and ' on the " ' death,' so directs attention to the death of a person who " leaves property behind him, that had that section stood alone " it is reasonably clear that much property would have escaped " which the framers of the Act wished to tax. Accordingly we " have section 2. That section was authoritatively discussed in " your Lordships' House in the case of *Earl Cowley*.[6] Whether " Lord Macnaghten was strictly correct or not in saying that the " two sections were mutually exclusive seems to me to matter " little. At any rate—and that is all that is material—section 2 " sweeps into the net various things which section 1 would have " failed to secure, or, as Lord Watson put it in the case of " *Attorney-General* v. *Beech*,[7] ' it extends it to all cases where " ' a survivor of the deceased takes a succession, or I should " ' say rather, derives a benefit by reason of the death of the " ' deceased dependent upon and emerging upon the death of the " ' deceased.'

" How does section 2 do this? It does not do it by being " conceived in the words of a taxing section imposing the duty " on certain specified kinds of property. It does it by saying " that property passing on the death of the deceased—which is " already taxed by virtue of section 1—shall be deemed to include

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[4] [1914] A.C. 765; 30 T.L.R. 476.

[5] [1914] A.C. 765, 774, 775.

[6] [1899] A.C. 198.

[7] [1899] A.C. 53; 15 T.L.R. 85.

"the property following, that is to say—and then follow the "various subsections.

"It seems to me that that is as much as to say that the "words, 'property passing on the death,' in the first section, "are to be read as if the words 'including the property following, "'that is to say'—(and then all the subsections)—had been "there inserted. In other words, I do not think that anyone "can criticize Lord Macnaghten because in *Cowley's* case [8] he "talks of property being 'deemed to pass,' although that expression is not actually used. The net result is that the expression "'property which passes,' in the first section, must include "property which is deemed to pass by virtue of the second "section—for section 1 is the only taxing section."

Lord Parker observes [9]: "The second section of the Act, by "providing that property passing at the death shall be deemed "to include certain kinds of property which do not in fact pass "at the death, artificially enlarges the ambit of the expression "'property passing at the death.' It also artificially limits such "ambit by expressly excluding certain kinds of property which "do in fact pass at the death. It is in no sense a definition "section."

By that, of course, Lord Parker means that section 2 has the effect of removing from liability to tax certain kinds of property on which otherwise the tax would be imposed by section 1. Accordingly the provisions, at any rate of subsections (2) and (3) of section 2 (limiting the property subject to tax), do relate back to section 1 and affect the incidence of that section. It is, indeed, not disputed that the limiting provisions in regard to foreign property and property held by the deceased as trustee in these subsections have the effect of cutting down the charging provisions of section 1.

Further comments on these two sections are to be found in *In re Duke of Norfolk*,[10] which was a case of a continuing annuity for more than one life given to persons in succession, held to pass under section 1, so that duty could not be claimed as on the cesser of an interest, under section 2 (1) (*b*), on a slice of the property charged with the annuity. The Court of Appeal considered that they were bound by Lord Macnaghten's construction of sections 1 and 2 in *Earl Cowley* v. *Inland Revenue Commissioners* [11] that, if the case fell within section 1, a claim to tax could not be made under section 2 (see *per* Evershed M.R. and *per* Jenkins L.J.[12]). But this case does not appear to me to bear very directly on the question I have to decide.

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[8] [1899] A.C. 198.

[9] [1914] A.C. 765, 779.

[10] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[11] [1899] A.C. 198.

In *Sanderson* v. *Inland Revenue Commissioners* [13] the cases of *Earl Cowley* v. *Inland Revenue Commissioners* [14] and *Attorney-General* v. *Milne* [15] were considered by the House of Lords. A settlor, who died in 1943, had voluntarily settled on trusts for his son and daughter in 1942 shares in a private company. There was no doubt that estate duty had become payable on the shares under section 2 (1) (*c*) of the Finance Act, 1894. The question was whether the method of valuation, substituted by section 55 (1) of the Finance Act, 1940, for the provisions of section 7 (5) of the Act of 1894, applied. The House of Lords held that the section was simply a valuation section and applied equally to property passing on death under section 1 and to property deemed to be included by the provisions of section 2. The relationship of sections 1 and 2 of the Act of 1894 is discussed in some detail by Lord Radcliffe, and I must read some passages from his speech. He said [16]: " Estate duty is not charged by the Act " upon two different kinds or classes of property, property which " passes in the natural sense and property which is deemed to " pass by virtue of special statutory provision. Strictly speaking, " as has often been pointed out, no property at all is ' deemed to " ' pass ' under the Act. What section 1 provides is that estate " duty is to be charged upon all property passing on death, " whether real or personal, settled or not settled. It offers no " other clue as to the meaning to be attached to those words. " What section 2 provides is that property passing on death is " to be deemed to include certain kinds of property or, perhaps " more accurately, certain property in certain situations, and is " not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion " provision which is contained in section 2 (3) applies to all " property passing, whether it passes under section 1 simpliciter " or under section 1 so enlarged or interpreted by section 2 (1). " But the result of this is that it is section 1 and no other section " that imposes the charge of estate duty, that the charge so " imposed is imposed upon property that passes on death and " no other property, and that the effect of section 2 (1) is to give " to the word ' passes ' in section 1 a meaning wider and, if you

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[12] [1950] Ch. 467, 473, 484.

[13] [1956] A.C. 491; [1956] 1 All E.R. 14.

[14] [1899] A.C. 198.

[15] [1914] A.C. 765.

[16] [1956] A.C. 491, 498.

"please, less natural than it would have had if section 2 (1) had "not been enacted. Personally, I find this approach to the "general purport of the Act a more satisfactory method than that "of dividing the property charged by the Act into two categories "consisting in the one case of property actually passing and in "the other of property notionally passing, categories which the "Act itself does not employ."

Then, after distinguishing *Attorney-General* v. *Milne*[17] as being a special case, relating to the provisions as to settlement estate duty, Lord Radcliffe says[18]: "I do not see that our "decision can be said in any way to conflict with those earlier "cases. The most that can be said in that connexion is that it "will leave unexplained what exactly Lord Macnaghten meant "in *Cowley*[19] when he said of sections 1 and 2 'the two sections "'are mutually exclusive,' or what Lord Haldane meant in "*Milne*[20] by the words 'Section 2 is thus not a definition section, "'but an independent section operating outside the field of "'section 1.' But, as Lord Macnaghten's words have been a "matter of inquiry since the year 1900 (see *Attorney-General* v. "*Dobree*,[21] *per* Channell J.), and since Lord Haldane himself "gave a substantially different explanation of the relation of the "two sections in *Nevill* v. *Inland Revenue Commissioners*[22] "when he said: 'The principle is contained in section 1. Sec- "'tion 2 combines definitions of such property with the extension "'of the application of the principle laid down in section 1 to "'certain cases which are not in reality cases of changing hands "'on death at all . . .', I think that we may safely resign these "passages to the list of the many minor mysteries of the law."

I was also referred to *De Trafford* v. *Attorney-General*,[23] but that case does not seem to me to advance the matter in any way.

From the cases which I have mentioned the following propositions are deducible, it appears: (1) Section 1 of the Finance Act, 1894, is the charging section, and if a case falls within the terms of that section, it is unnecessary to refer to the including or extending provisions of section 2. (2) None the less the restricting or excluding provisions to be found in subsections (2) and (3) of section 2 *do* affect cases which would fall within section 1. So that foreign property in appropriate cases, and

[17] [1914] A.C. 765.

[18] [1956] A.C. 491, 500.

[19] [1899] A.C. 198.

[20] [1914] A.C. 765.

[21] [1900] 1 Q.B. 442, 450; 16 T.L.R. 80.

[22] [1924] A.C. 385, 389; 40 T.L.R. 341.

[23] [1935] A.C. 280; 51 T.L.R. 298.

trust property (unless chargeable as a gift), which do pass on a death are excluded from the charge of section 1.

The question still remains whether the excluding provision which is contained in section 2 (1) (*b*) is capable of application to the case of property which passes within the unextended or natural meaning of section 1 of the Act. For this purpose, it appears to me to be necessary to refer again to the precise words of section 2 (1) (*b*). These are: " Property in which the deceased " or any other person had an interest ceasing on the death of " the deceased, to the extent to which a benefit accrues or arises " by the cesser of such interest; but exclusive of property the " interest in which of the deceased or other person was only an " interest as holder of an office, or recipient of the benefits of a " charity, or as a corporation sole." It seems to me that grammatically the second or excluding portion of this provision must refer to the preceding or including part of the provision. The provision is saying that the situation mentioned shall be included in the ambit of the tax, but not so as to bring in cases which are then mentioned. It is not a general provision excluding from liability these cases from the ambit of the Act; it is an exclusion from the extended and artificially included case of certain things to which that artificial provision would otherwise be applicable. Mr. Pennycuick has called my attention to some illogical results which this reading of the provisions will cause. But I do not feel that considerations of that kind justify a departure from the plain grammatical arrangement of the words used.

Accordingly, it appears that the excluding words in section 2 (1) (*b*) do not apply to the present case.

There is also another point which was taken on behalf of the Inland Revenue Commissioners and with which I think I ought to deal. It is said that the interest which Arnholz had in the present case under the provisions of Lord Northcliffe's will was not " only an interest as holder of an office "—in the words of the provision in section 2 (1) (*b*)—with an emphasis on the word " only."

In *Attorney-General* v. *Eyres* [24] the testator had provided for the payment of " an annual sum of £200 each to the trustees or " trustee while acting in the trusts by way of remuneration for " their services, and in addition to any payments for professional " services." Channell J. held that on the death of an original trustee the annual sum of £200 did not attract estate duty or settlement estate duty because the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception in section 2 (1) (*b*). It was sought to distinguish this case on the basis of an argument that in the present case, as the remuneration was not given to all the trustees from time to time and in view of the testator's reference to the personal qualities of Arnholz and Sir George Augustus Sutton, the benefit received by them was of a personal and beneficial nature and not annexed to their offices as trustees. This argument seems to me quite untenable. No doubt the appreciation of the qualities of Arnholz and Sir George Sutton by the testator was the reason of his selection of them to be trustees, but the shares of income are given to them by clause 6 of the will only so long as they act as executor and trustee respectively and by way of remuneration for so doing. I understand that Sir Lynn Ungoed Thomas desired to keep open for argument in a higher court whether the position of trustee is an office within the meaning of section 2 (1) (*b*). But I feel no doubt that it is an office and that Arnholz and Sir George Sutton received their remuneration in the form of shares of income only as holders of that office. This view is also supported by the decision of the House of Lords in *Dale* v. *Inland Revenue Commissioners* [25] that the remuneration of a trustee was "earned income"—arising in respect of any remuneration from any office or employment of profit—in regard to the "special contribution" imposed by the Finance Act, 1948.

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[24] [1909] 1 K.B. 723; 25 T.L.R. 298.

On this point, therefore, the arguments on behalf of the Inland Revenue Commissioners fail.

In my opinion, therefore, the question raised by the summons should be answered in the affirmative, and I will make a declaration accordingly.

Declaration accordingly.

Solicitors: *Russell & Arnholz; Solicitor, Inland Revenue.*

I. G. R. M.

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[25] [1954] A.C. 11; [1953] 2 All E.R. 671.

CHAPPELL & CO. LTD. *v.* NESTLÉ CO. LTD AND ANOTHER.

C. A.

1958
Feb. 3, 4, 5;
Mar. 19.

Jenkins, Romer and Ormerod L.JJ.

[1957 C. 2761.]

Copyright—Infringement—Musical work—Gramophone records—Distribution for cash price to members of public sending chocolate wrappers—Whether sale "by retail"—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 8—*Copyright Royalty System (Records) Regulations,* 1957 (*S.I.* 1957, *No.* 866), *para.* 1.

The H. Co. manufactured and sold to the N. Co., who were manufacturers of milk chocolate, a number of gramophone records of a work which was "musical" within the meaning of the Copyright Act, 1956, and the copyright of which belonged to the plaintiffs. The recording was made on a thin film of cellulose acetate adapted for mounting on cardboard discs which were supplied by the N. Co. and bore matter advertising their chocolate, the price charged to the N. Co. being fourpence per record. The N. Co. advertised the records for sale to the public at the price of 1s. 6d. each, but with a stipulation to the effect that intending purchasers must in respect of each record send in addition three wrappers from sixpenny packets of their milk chocolate. The company made a profit on each transaction. The wrappers when received were worthless and were thrown away.

By a motion, which was treated by consent as the trial of the action, the plaintiffs sought to restrain the two companies from manufacturing and selling the records on the ground that the transactions involved breaches of copyright in that the H. Co. did not intend to sell the records "by retail," or to supply them for the purpose of their being sold "by retail" by another person, within the meaning of section 8 of the Copyright Act, 1956.[1] Upjohn J. gave judgment for the plaintiffs. On appeal:—

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[1] Copyright Act, 1956, s. 8: "(1) The copyright in a musical work is not infringed by a person (in this section referred to as 'the manufacturer') who makes a record of the work or an adaptation thereof in the United Kingdom, if—(*a*) records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in, or imported into, the United Kingdom for the purposes of retail sale, and were so made or imported by, or with the licence of, the owner of the copyright in the work; (*b*) before making the record, the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it; (*c*) the manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be so sold or supplied; and (*d*) in the case of a record which is sold by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the following provisions of this section. (2) Subject to the following provisions of this section, the royalty mentioned in paragraph (*d*) of the preceding subsection shall be of an amount equal to 6¼ per cent. of the ordinary retail selling price of the record, calculated in the prescribed manner: Provided that, if the

Held (Romer L.J. dissenting), that the transaction constituted a sale by retail such as to satisfy the requirement of the section; as (1) the distinguishing characteristic of a retail sale was a sale to the consuming customer as opposed to a sale to the trade; (2) the transaction was a genuine sale at an ascertained money price, since the effect of the condition requiring the sending of the wrappers was merely to limit the class of purchasers to those who so qualified themselves; and (3) the money price being ascertained, the manufacturers were enabled to give the appropriate notices of their intention to manufacture as required by the relevant regulations.[2]

Per Romer L.J. I am unable to see how there can be an "ordinary retail selling price" (within the meaning of section 8 (2)) in the absence of an ordinary retail sale. The sales were not ordinary retail sales; they did not, therefore, constitute sales "by "retail" of the character envisaged and required by section 8.

Observation of Lord Dunedin in *Turpin* v. *Middlesbrough Assessment Committee* [1931] A.C. 470 at p. 473; 47 T.L.R. 308 applied.

Decision of Upjohn J. reversed.

APPEAL from Upjohn J.

The Hardy Record Manufacturing Co. Ltd., the second defendants, made gramophone records consisting of thin films of cellulose acetate. They entered into an agreement with the first defendants, the Nestlé Co. Ltd., who were manufacturers of milk chocolate, to supply them with a number of records of a dance tune called "Rockin' Shoes," the copyright of which was vested in the first plaintiffs, Chappell and Co. Ltd., as sole licensees and in the second plaintiffs, the Winneton Music Corporation, as owners. The price to Nestlé of the records was fourpence; they were mounted on cardboard discs supplied by Nestlé containing advertising matter. Nestlé sold the records to the public at the price of 1s. 6d., subject to a condition that the purchaser must

"amount so calculated includes a "fraction of a farthing, that fraction "shall be reckoned as one farthing, "and if, apart from this proviso, the "amount of the royalty would be "less than three-farthings, the "amount thereof shall be three-"farthings."

[2] The Copyright Royalty System (Records) Regulations, 1957: "1 (1) "The notice required by subsections "(1) and (5) of section 8 of the Act "shall contain the following particu-"lars:—. . . (*f*) the ordinary retail "selling price (as hereinafter defined) "of the records, or, where it is in-"tended to reproduce the work on "more than one type of record, the "ordinary retail selling price of each "type of record, the manufacturer "intends to make and the amount of "the royalty payable on each record; ". . . 3. The ordinary retail selling "price of any record shall be calcu-"lated at the marked or catalogued "selling price of single records to the "public, or if there is no such marked "or catalogued selling price, at the "highest price at which single records "are ordinarily to be sold to the "public, exclusive of purchase tax in "either case."

also send three wrappers for their sixpenny milk chocolate bars. These wrappers were of no value in themselves and were thrown away when received. Nestlé made a profit on each sale, but the purpose of the scheme was to advertise and promote the sale of their milk chocolate.

The Hardy company gave notice of their intention to manufacture, in accordance with section 8 (1) (*b*) of the Copyright Act, 1956, stating 1s. 6d. to be the ordinary retail selling price, and offered to pay royalties, which the plaintiffs refused. In the action the plaintiffs alleged that these transactions constituted a breach of copyright, as they did not involve a sale "by retail" within the meaning of the section. An interlocutory motion for an injunction was treated, by consent, as the trial of the action. At the hearing of the motion Upjohn J. gave judgment for the plaintiffs. The defendants appealed.

Guy Aldous Q.C. and *John Whitford* for the first defendants. Under section 8 (1) of the Act, once records of a musical work have been made and marketed with the licence of the copyright owner, anyone can make records of that work "for the purposes "of retail sale" subject to giving the prescribed notice and paying the prescribed royalties; the question in this case is, What is the meaning of "retail sale"? The judge below held that that meant a sale for cash, a money price, and that Nestlé's transactions fell outside that definition, as they got the advantage of the sales of the three chocolate bars in each case and of the advertisement which the scheme gave them.

The defendants say that the true meaning is the ordinary meaning, i.e., a sale to the consumer and not to a wholesaler. Further, apart from statute, a work once published is free to the public; the Act provides for penalties for infringement, so it should not be construed so as to restrict the public more than necessary. Even if the judge was right in his definition, the sale of a record for 1s. 6d. to a person who produces three worthless wrappers is a cash sale; he was confusing the total benefit to Nestlé with the consideration moving from the buyer; the fact that Nestlé might get some indirect advantage does not prevent the transaction from being a sale. It is submitted that the wrappers form no part of the consideration; the effect of the requirement is to limit the class of persons who can become buyers by retail within the ordinary meaning of that expression.

C. A.
1958

CHAPPELL & Co. LTD. *v.* NESTLÉ Co. LTD.

The transaction in the present case is a sale, and the judge so held; it is not a case where the consideration was the extinguishing of an antecedent debt, as in *Simpson* v. *Connolly.*[3] The defendants' view as to the meaning of a retail sale is reinforced by the language of the Finance (No. 2) Act, 1940, which introduced purchase tax, and in section 41 provided that "selling by retail "means selling otherwise than by wholesale." In *Turpin* v. *Middlesbrough Assessment Committee*[4] Lord Dunedin associated retail trade with the "consuming customer."

Before the Copyright Act, 1911, anybody could make records freely: *Boosey* v. *Whight.*[5] The court will not, unless forced to do so, construe widely Acts which take away public rights: see *Walsh* v. *Secretary of State for India*[6] and *David* v. *De Silva.*[7] The Act of 1911 placed no restrictions on the method of sale, as does the present Act, which introduces for the first time the restriction of retail sale. A fortiori the court will give a wide construction when an Act imposes penalties for infringements: see *London County Council* v. *Aylesbury Dairy Co. Ltd.*[8] and *Rex* v. *Chapman.*[9]

John Cope, for the second defendants, adopted the arguments set out above.

K. E. Shelley Q.C. and *P. Stuart Bevan* for the plaintiffs. It is quite erroneous for the purposes of section 8 of this Act to divide a sale into two exclusive categories of retail and wholesale. That was no doubt proper for the ascertainment of liability to purchase tax, but here the contrast is between selling by well-established retail methods and by other methods of distribution, which may have some of the characteristics of an ordinary retail sale. The Act is intended broadly to confer copyright on the author, and section 8, which provides an exception to that right, ought to be interpreted narrowly. The section does not deal with the sale of goods in general, but of records for reproducing sound, and authorities dealing in general with the sale of goods have no application.

The question must be regarded as concerning the manufacturer. If Hardy have not infringed, neither of the defendants can be made liable. But Hardy must both give the requisite notice and intend that the records shall be sold by retail. Nobody makes records without intending that they shall eventually reach the ultimate consumer, and to construe the section as the defendants seek to do is to give it no meaning.

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[3] [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474.

[4] [1931] A.C. 470, 473; 47 T.L.R. 308.

[5] [1900] 1 Ch. 122; 16 T.L.R. 82.

[6] (1863) 10 H.L.Cas. 367.

[7] [1934] A.C. 106; 50 T.L.R. 165.

[8] [1898] 1 Q.B. 106.

[9] [1931] 2 K.B. 606; 47 T.L.R. 620.

The true interpretation is to be derived from subsection (2), which provides that the royalty shall be based on "the ordinary "retail selling price." That means that there must be ordinary sales in retail shops in the ordinary way of commerce, without any question of the customer qualifying himself in any special way or tendering any consideration other than cash or credit. Parliament was concerned to preserve the rights of business conducted through the normal channels, whereby the copyright owner receives a proportion of the whole consideration received for the disposal of the records; it was not concerned with schemes such as this, where the seller gets indirect advantages.

Having regard to the terms of the Act and the regulations, the defendants must establish a case whereby any ordinary member of the public, without any qualification, can obtain a record by tendering the list price, such price being the full consideration for the sale. In the present case there is no ordinary retail selling price, and no proper notice under the Act and regulations can be tendered; that consideration must be stated in terms of money, and in an advertising scheme such as this it is impossible to state that consideration; the same argument applies to the calculation of the royalties; there is no cash price on which to assess them. The section and regulations are concerned with sales in the ordinary course of retail business at an ascertained price to an unrestricted public. Here there is nothing fixed or ascertained; there is nothing to prevent Nestlé from reducing the price and requiring the sending of more wrappers.

Bevan following. Section 8 (2) requires that there shall be a calculation in the prescribed manner, so "retail sale" must be limited to where there is an ordinary retail selling price, and other transactions which prima facie might be thought to be retail are outside the ambit; examples are sales by auction or sales to a restricted section of the public, such as the members of co-operative societies.

Aldous Q.C. in reply. Because subsection (2) refers to "ordinary" retail selling price, that is no reason for excluding from the ambit of subsection (1) sales by co-operative societies or vendors who limit their customers in some way. It is quite wrong to postulate that no manufacturer produces a record except for sale to the ultimate consumer; examples to the contrary are the B.B.C. and film companies. The purpose of section 8 is to ensure that such recordings, not made with the intention of future sales, shall not frank manufacturers generally to make reproductions subject to the payment of royalties. [*Savill Brothers Ltd.* v. *Bethell* [10] was also referred to.]

Cur. adv. vult.

March 19. JENKINS L.J. I will ask Ormerod L.J. to deliver the first judgment.

ORMEROD L.J. This is an appeal from an order of Upjohn J. made on November 14, 1957, that the defendant be restrained from infringing the copyright in a musical work entitled "Rockin' "Shoes" or any other musical work of which the plaintiffs are the owners of the copyright or under which they have been granted an exclusive licence. The matter came before the judge on a consent order that the motion originally launched by Chappell & Co. Ltd., the exclusive licensees, should be treated as the trial of the action, and the owners of the copyright, the Winneton Music Corporation, were allowed to be joined as plaintiffs. By consent of the parties the action was tried on the evidence filed on the motion. There were no pleadings and no issues arose on the facts. The sole question was, and is, the construction to be put upon the words "retail sale" in section 8 of the Copyright Act, 1956.

It will be useful before setting out the facts to read the relevant parts of the section in question. [His Lordship read section 8 (1) and (2) and continued:] From this it will be seen that the copyright in a musical work is not infringed by a person making a record thereof provided the conditions set out in the section are fulfilled. In this case, apart from a question on the notice, with which I will deal later, the only condition which it is claimed has not been fulfilled is the one set out in subsection (1) (*c*), namely, that the manufacturers intended to sell the record by retail or to supply it for the purpose of being so sold. It is not disputed that the manufacturers knew how Nestlé's intended to deal with the records, and supplied them for that purpose.

The facts are that the Hardy Record Manufacturing Co. Ltd., whom I shall refer to as the manufacturers, make records by a new process which is so inexpensive as to enable them to be sold wholesale for 4d. each. They are one-sided records made on a thin film of cellulose acetate, and are designed to be played at

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[10] [1902] 2 Ch. 523.

78 revolutions per minute. Nestlé's, the well-known suppliers of milk chocolate and other similar products, entered into an agreement with the manufacturers to purchase a quantity of recordings of a piece of dance music called "Rockin' Shoes," the copyright of which was vested in the plaintiffs. They caused to be supplied to the manufacturers the necessary cards on which the records could be mounted. On the cards was printed, amongst other matters, a notice that this and other records could be obtained by sending to Nestlé's for each record a postal order for 1s. 6d., together with three wrappers for Nestlé's 6d. milk chocolate bars. It was agreed by Nestlé's that the object of selling records in this way was to advertise their milk chocolate. None the less, they stated, and it was not disputed, that the price of 1s. 6d. enabled them to make a reasonable profit on the sale of a record. The judge held that sales of records such as this were not retail sales within the meaning of the section, and granted an injunction to the plaintiffs.

Mr. Aldous on behalf of the appellants contended that the words in question in the statute should be given their normal meaning, and that "sale by retail" meant a sale to the consuming customer in contrast to a wholesale sale which is a sale to the trade. He further contended, as a matter of construction, that under the general law a work once published is free to the public. The Copyright Acts restrict that freedom and impose penalties for infringement, and should therefore be construed so as not to restrict the public more than necessary. He cited *Boosey* v. *Whight*,[1] which established that there was no copyright in recorded music (in that case the perforated sheets for an "Aeolian" organ) and submitted that the section of the Copyright Act, 1911, which restricted the freedom of performance of recorded music, and section 8 of the Act of 1956 which replaced it, should not in consequence be given an interpretation more restrictive than was strictly necessary. He cited a number of authorities in support of this submission, including *Walsh* v. *Secretary of State for India*,[2] *David* v. *De Silva*,[3] and, to show that the principle was applied more rigidly if penal consequences were involved, *London County Council* v. *Aylesbury Dairy Co. Ltd.*[4] and *Rex* v. *Chapman*.[5]

It was further contended that even if, as the judge appears to have held, a sale by retail meant a cash sale, that is, a sale where the consideration was wholly in money, the sale of a record under the conditions set out above was in fact a cash sale.

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[1] [1900] 1 Ch. 122; 16 T.L.R. 82.

[2] (1863) 10 H.L.Cas. 367.

[3] [1934] A.C. 106; 50 T.L.R. 165.

[4] [1898] 1 Q.B. 106.

[5] [1931] 2 K.B. 606; 47 T.L.R. 620.

Mr. Shelley on behalf of the respondents contended in the first place that, as the effect of section 8 was to make an exception to the grant of the broad right of copyright, it should in consequence be construed narrowly. He further contended that a sale by retail meant a sale in the ordinary way of a trader's business, and that the section did not contemplate a transaction such as this, which was for the purpose of advertising Nestlé's goods, and in respect of which other conditions had to be fulfilled by the purchaser in addition to the payment of the price. It was submitted that the use in section 8 (2) of the term "ordinary "retail selling price" as a basis for calculating the royalty to be paid necessarily implied that the sale "by retail" in subsection (1) (*c*) should be an "ordinary" retail sale. The contrast contemplated in the section, submitted Mr. Shelley, was not the contrast between wholesale and retail, but between selling by retail on the one hand and methods of distribution which might have some of the indicia of a sale on the other, and the transaction in question came within the latter classification.

Whichever way the transaction is regarded, it is not disputed that it was a sale. *G. J. Dawson (Clapham) Ltd.* v. *H. & G. Dutfield*,[6] and indeed a number of earlier authorities, establish beyond doubt the proposition that a transaction is none the less a sale because part of the consideration consists of the exchange of other goods.

There seems to be little authority as to the definition of "retail." In *Turpin* v. *Middlesbrough Assessment Committee* [7] Viscount Dunedin said: "It may be that in strictness the words "'retail trade or business' are only applied with complete "accuracy to cases of selling goods; or it may be that they may "properly be applied to all trades and business which deal "directly with the 'consuming' customer." The question under consideration there was whether a garage and motor repair depot was an industrial hereditament within section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, but it would certainly appear that Lord Dunedin regarded dealing with the consuming customer as a necessary ingredient of "retail trade."

For my part, after a careful consideration of the words of the section and of Mr. Shelley's submissions, I can find no sufficient ground for the meaning which he seeks to attribute to the word "retail." The distinction appears to me to be between a sale to the trade on the one hand, and to the public, or, as Lord Dunedin put it, to the consuming customer on the other. A retail sale may take place in a number of ways. The commonest way, no doubt, is by a sale in a shop over the counter. But it may, and frequently does, take place by means of the post and other similar means. Again, a retail sale may be for cash or for credit, or may be in part exchange of other goods, as is frequently so in the case of motor-cars.

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[6] [1936] 2 All E.R. 232.

[7] [1931] A.C. 470, 473; 47 T.L.R. 308.

It was suggested at one stage of the argument that a sale could not be by retail if there were conditions or restrictions attached to it. This would exclude from the definition sales by a co-operative society or by any dealer who sought to limit in any way the number or class of his customers.

How, then, does the transaction in question fall short of being a sale by retail? It was admitted on behalf of the plaintiffs that, if Nestlé's had offered the record for sale as it was except for the condition attached of sending three chocolate wrappers, the transaction would have been within the terms of the section. It is necessary to consider, therefore, the effect of the condition. It is agreed that the wrappers were of no value, but the plaintiffs submitted that they were part of the purchase price of the record. The defendants took the view, on the other hand, that the object of the condition was to limit the class of purchasers so that the only people who could purchase the records were those who had qualified to be members of the class by sending the necessary wrappers. This latter view appears to me to be the correct one, and in these circumstances I find it difficult to see why this should not be a sale by retail just as much as it would be if no condition were attached.

It was argued that Nestlé's might alter the terms of the sale by increasing the number of wrappers required and reducing the price to one that would bear no relation to the cost of the record. That, of course, is not this case, and it might be that under such circumstances the transaction might be held not to be a genuine sale. But in any event the proviso to section 8 (2) sets out the minimum royalty to be paid, so that it may well be that in such circumstances the owner of the copyright would suffer no undue hardship.

It was further argued that, although Nestlé's were selling the records at a reasonable profit, the real advantage to them was the profit they made, or expected to make, on the sale of their usual products as a result of what was admittedly an advertising campaign. This argument appears to have found favour with the judge, who says, after dealing with the value to Nestlé's of the chocolate wrappers: "This bears no resemblance at all to the "transaction to which, in my judgment, the section is pointing, "that is, an ordinary retail sale with an ordinary selling price." I cannot agree with this view. The motive for making the sale does not appear to be relevant, nor does the fact that the seller hopes to obtain some benefit from the transaction other than the actual profit on the sale.

A further argument put forward by the plaintiffs was that this transaction could not be a retail sale within the meaning of section 8, as it was impossible to comply with the provisions of section 8 (1) (*b*) that the manufacturer should, before making the record, give to the owners of the copyright a prescribed notice of his intention to make it. The particulars required in the notice are set out in paragraph 1 (1) of the Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957, No. 866), made in pursuance of powers contained in the Act, subparagraph (*f*) of which is as follows. Paragraph 1 (1) of the Order reads: "The notice "required by subsections (1) and (5) of section 8 of the Act shall "contain the following particulars," and in (*f*) the particulars are as follows: "The ordinary retail selling price (as hereinafter "defined) of the records, or, where it is intended to reproduce "the work on more than one type of record, the ordinary retail "selling price of each type of record the manufacturer intends "to make and the amount of the royalty payable on each record."

Then in paragraph 3 it is provided that "The ordinary retail "selling price of any record shall be calculated at the marked or "catalogued selling price of single records to the public, or if "there is no such marked or catalogued selling price, at the "highest price at which single records are ordinarily to be sold "to the public, exclusive of purchase tax in either case."

It is agreed that notice was given by the manufacturers, but the ordinary retail selling price was set out in the notice as the amount at which the records were to be sold without reference to the wrappers. The plaintiffs' submission was that, as the ordinary retail selling price could not be set out in the notice, the transaction could not be one within the section. If the view I have expressed above is the correct one, that the transaction was intended to be a sale of records for 1s. 6d. each, limited to persons who sent three wrappers in respect of each record, there does not appear to be any substance in this argument.

It follows from what I have said that, in my view, taking the ordinary meaning of the words used in the section, the transactions contemplated by Nestlé's were sales by retail, and the defendants were entitled to make and sell the records in accordance with the provisions of section 8 (1) of the Copyright Act. In the circumstances, it is unnecessary to consider whether the words of the section should be given a broad or a narrow construction in accordance with the respective contentions of the parties. I would allow the appeal.

JENKINS L.J. The substantial question in this appeal is whether the second defendants, Hardy Record Manufacturing Co. Ltd., in making gramophone records of the musical work "Rockin' "Shoes" and supplying them to the first defendants, the Nestlé Co. Ltd., for the purpose of their being disposed of by the first defendants in the manner I am about to describe, were, as regards any given record so made and disposed of, making and supplying the record "for the purpose of its being sold by retail by another "person" within the meaning of section 8 (1) (*c*) of the Copyright Act, 1956. If, as the judge held, that question should be answered in the negative, the second defendants are not entitled to the benefit of the exception provided by section 8 and must, accordingly, be held, in accordance with the judge's decision, to have infringed the copyright in the work (of which the second plaintiffs are the owners and the first plaintiffs the exclusive licensees) by making the records in question under sections 1 (2) and 2 (5) (*a*) of the Act; and the first defendants must likewise be held to have infringed such copyright by distributing the infringing records under section 5 (3).

I need not repeat the facts at length. Briefly, the second defendants made records of "Rockin' Shoes" and other musical works by a novel and remarkably cheap process, in which the recording was made on a thin film of cellulose acetate adapted for mounting on a cardboard disc. The second defendants sold these records to the first defendants at 4d. each (the first defendants providing the cardboard mounts), and the first defendants advertised them for sale at 1s. 6d. each, but with a stipulation to the effect that intending purchasers must, in respect of each record. send to the first defendants in addition to the 1s. 6d., three wrappers from 2 oz. (6d.) packets of Nestlé's milk chocolate. The price of 1s. 6d., after providing for the costs of the records and 4½d. purchase tax, left the first defendants with 9½d. per record, which sufficed to cover the cost of the cardboard mountings, postage and the like, and leave some profit. The wrappers are, in themselves, completely worthless, and are thrown away when received.

In these circumstances, is the transaction between the first defendants and any person to whom they supply a record on the terms above stated, a sale by retail within the meaning of section 8?

The Act contains no definition of " sale by retail," and one is thus thrown back upon the ordinary meaning of the words, which I take to be sale to persons buying for their own use or consumption as distinct from persons buying for resale in the course of trade. Some support is to be found for this meaning in the passage from the speech of Lord Dunedin in *Turpin's* case,[8] to which Ormerod L.J. has already referred.

Mr. Shelley, for the plaintiffs, relied upon the reference in section 8 (2) to " the ordinary retail selling price of the record " as the figure on which the royalty is to be calculated as showing that the sale by retail contemplated in section 8 (1) (*c*) is to be an ordinary sale by retail, or, in other words, a sale by retail in the ordinary course of the business of selling records by retail. The so-called sales by retail of records in the present case did not, in his submission, answer this description, inasmuch as they were not sales in the ordinary course of the business of selling records by retail to customers paying a stipulated money price without any superadded condition or consideration to be performed or provided by such customers. Here each sale was subject to the condition that the purchaser should not only pay the money price of 1s. 6d. per record, but should produce his three Nestlé's chocolate wrappers. Mr. Shelley said, in effect, that this is not a retail sale in the ordinary course of the business of selling records by retail, but is a sale of records for a cash consideration plus the performance by the purchaser of a special condition designed to promote the sale of Nestlé's chocolate.

I cannot myself regard the reference in section 8 (2) to the ordinary retail selling price as limiting the meaning of section 8 (1) (*c*) in the way suggested by Mr. Shelley, and in this connexion I would observe that by the joint effect of section 8 (2) and paragraph 3 of Statutory Instrument, 1957, No. 866, made under the section, the meaning relevant to the present case of the words " ordinary retail selling price " is simply " the highest price at

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[8] [1931] A.C. 470, 473.

"which single records are ordinarily to be sold to the public, "exclusive of purchase tax. . . ." To bring a given case within section 8 of the Act, first, the sale of the record which it is intended to effect must, no doubt, be sales by retail (that is to say, sales to members of the public for their own use as distinct from persons buying for resale in the way of trade); secondly, such sales, to make them sales at all as distinct from gifts, must be sales at a price; thirdly, the price must, as I think (although Mr. Aldous, for the defendants, was disposed to argue the contrary), consist of a sum of money or, at all events, of valuable consideration to which a precise equivalent in terms of money can be assigned. This last requirement appears to me to be impliedly demanded by the provisions in regard to the calculation of the ordinary retail price of the record, and the computation of royalties thereon contained in section 8 (2) of the Act and paragraph 3 of Statutory Instrument, 1957, No. 866, made under the section.

Given fulfilment of these three requirements, it seems to me that section 8 applies, and that there is no justification for assigning to subsection (1) (*c*) the limited meaning suggested by Mr. Shelley, which would confine its application to retail sales in the ordinary course of the business of selling records by retail, and might have the effect of excluding transactions which, apart from that limitation, would undoubtedly rank as sales by retail in the commonly accepted sense of that expression.

The questions to be answered in the present case are accordingly these, and I append to each of them the answer which, in my view, should be given to it: First, if sales at all, were the sales of records effected by the Nestlé Co. in the way above described sales by retail within the meaning of section 8 (1) (*c*)? In my view this question must undoubtedly be answered in the affirmative. The offer was clearly directed to such members of the public as might wish to acquire the records for their own use, and could not be of the slightest interest to persons requiring records for resale in the way of trade.

Secondly, were these transactions sales as distinct from gifts? Here, again, the answer must, I think, clearly be in the affirmative. The cash price of 1s. 6d. per record, according to the evidence, left the Nestlé Co. with some profit, and each purchaser of a record did at all events undoubtedly pay that amount, whether the condition as to the delivery of the three chocolate wrappers should or should not be regarded as importing some addition to the price over and above the cash payment of 1s. 6d.

Thirdly, did the price paid for each record consist of a sum of money or, at all events, of valuable consideration to which a precise equivalent in terms of money could be assigned?

This seems to me to be the difficult point in the case. The transaction has been described and analysed in various ways in the course of the argument. Mr. Aldous was prepared, if necessary, to contend that it was a sale for 1s. 6d. in cash plus three wholly valueless chocolate wrappers which, being wholly valueless, could be ignored. This attractively simple proposition appears to me to be far removed from the realities of the case. On the other side it was argued that the transaction was a sale for a price consisting of 1s. 6d. in cash, plus the benefit resulting to the Nestlé Co. from the purchase by somebody of three sixpenny packets of their chocolate evidenced by the three empty wrappers. Apart from the difficulty that the wrappers produced by any given purchaser need not necessarily represent chocolate bought by him, I do not think that this view of the effect of the condition requiring the production of three wrappers is maintainable, nor, as I understand the argument, was it sought to be maintained to the extent of allocating some part of the price of the chocolate to the price of the record. Whoever bought the chocolate represented by the three wrappers must be taken to have bought it at the ordinary retail price of 6d. per packet. That price, no doubt, includes some element of net profit to the Nestlé Co., but it is a price wholly attributable to and exhausted by the purchase of the chocolate. Moreover, whoever bought the chocolate would presumably have bought it from a retailer and not from the Nestlé Co. itself. Accordingly, I do not think that the cash price of 1s. 6d. per record can be treated as increased by the amount of the net profit accruing to Nestlé's in respect of the sale of the chocolate represented by the three empty wrappers or any part of that amount.

A simplified form of the bargain (more favourable to the plaintiffs' contention than the actual bargain involved) might be thus expressed: In consideration of your buying three packets of our chocolate at the ordinary retail price of 6d. each, and evidencing such purchase by sending us the three empty wrappers we, the Nestlé Co., will sell you a record from our list at the price of 1s. 6d. If the bargain was in that form, I think that it would be difficult to maintain that the price of the record was not simply 1s. 6d. (which admittedly showed a profit to the Nestlé Co.) but 1s. 6d. plus some part of the price of the chocolate. A fortiori I think that it is still more difficult to do so where, as in the present case, the bargain does not require the intending purchaser of a record to buy chocolate but merely to produce empty chocolate wrappers.

But, say the plaintiffs, the stipulation as to the production of three empty wrappers was undoubtedly of the first importance to the Nestlé Co. and, indeed, the whole essence of their scheme, which was to encourage the purchase of their chocolate by persons wishful of obtaining the necessary qualification in wrappers to enable them to buy a record or records. I agree; but does it follow that the imponderable value to the Nestlé Co. of the stipulation, admittedly capable of estimation, if at all, only after the advertising campaign based on the "record offer" had run its course, should be apportioned amongst the individual transactions so as to make the price of the record in each case not merely 1s. 6d. but 1s. 6d. plus "x"? I think not.

In my judgment, the delivery of three Nestlé chocolate wrappers required by the terms of this offer should be looked upon as a condition qualifying the person delivering them to buy a record at the price of 1s. 6d. and not as an addition to the price of an unascertained and unascertainable amount representing some minute fraction of the advantage which the Nestlé Co. hoped to derive, in the form of increased sales of their chocolate, from the advertising campaign as a whole. In other words, I think that the effect of the offer was that anyone acquiring three empty wrappers as evidence of the purchase of three packets of Nestlé's chocolate became entitled to buy a record at the price of 1s. 6d. upon payment of that price and production of the three empty wrappers to show that they had been duly acquired.

The judge in substance accepted the submissions made on behalf of the plaintiffs. I can best state his conclusion, and the reasoning on which it was based, by making the following quotation from his judgment: "That is the matter I have to consider: "can this be regarded as a retail sale for the purposes of the "section?

"It seems to me that the section is directed to retail sales in "the ordinary course of business, that is to say, a sale for cash, "a money price. That is what a sale is ordinarily defined to be, "and the section is contemplating a sale for a money price.

"Can this transaction be so regarded? Now what does the "purchaser have to do? He cannot get the record on tendering "1s. 6d. He has either to purchase three bars of Nestlé's choco"late, or, as was suggested, spend a rather profitless or "unpleasant time scavenging in his neighbours' dustbins to see if

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"he can find any wrappers that have been abandoned by them; "but that is what he has to do. It does not seem to me that it is "proper to describe that as a cash purchase. What is the value "to the vendor, Nestlé's? It is very great indeed, because it is "all part of an advertising campaign, and I confess I listened "with some amazement to the argument which said that really "the existence of the wrappers in the letter containing the postal "order for 1s. 6d. could really be ignored because they were "worthless. That is not the transaction at all. In fact, Nestlé's "are making a nice profit on charging 1s. 6d. for the record, but "that is not the subject of this scheme at all; admittedly not. "Mr. Rainer was perfectly frank and fair about it. The whole "object, of course, is to promote sales of Nestlé's milk chocolate. "The price of 1s. 6d. is quite a minor consideration. It may be a "shilling one day or may be two shillings another; so that it is "not the point. The vital part of this transaction is to get in "three wrappers, and that represents a great deal of value to "Nestlé's, because it is evidence of an advertising campaign "pushing up their sales. That is the value to them. This bears "no resemblance at all to the transaction to which, in my judgment, the section is pointing, that is, an ordinary retail sale "with an ordinary retail selling price. I think it is quite wrong to "suppose that the retail selling price here is 1s. 6d. The purchaser has to purchase three bars of chocolate, and that is the "real value of this transaction to Nestlé's.

"In my judgment, therefore, this transaction cannot properly "be described as a transaction of retail sale and falls outside the "section."

For the reasons I have endeavoured to state, I am unable to accept the view that the cash price of 1s. 6d. per record should be treated as increased by some unascertainable amount on account of the stipulation requiring the delivery of three empty wrappers. If that view were right it would, as I think, follow that the resulting price of 1s. 6d. plus "x" would be a price incapable of statement as a sum of money and accordingly that the transaction would fail to satisfy the third of the three conditions I have postulated as necessary to qualify it for inclusion in section 8. But if, as I think, the price should be looked on as 1s. 6d. per record with a limitation of the offer of records at that price to such members of the public as should deliver three empty chocolate wrappers in respect of each record bought, then I cannot see that the transaction, undoubtedly a sale, is prevented from being a sale by retail within the meaning of section 8

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by the circumstance that the class of potential purchasers is limited to those who comply with the condition as to the delivery of wrappers. Section 8 (1) (*c*) refers to the selling of the record "by retail" simpliciter, with no superadded requirement to the effect that the sales referred to must be retail sales in the ordinary course of business. If a shopkeeper acquires a limited stock of some cheap and novel line of goods and offers them for sale at a price showing a profit, but nevertheless an apparently advantageous price from the customer's point of view, with an intimation that they will be sold only to customers who produce evidence of the purchase at his shop since a specified date of other goods to some prescribed minimum value, I cannot see that his sales to consuming, or in other words retail, customers of the special line of goods are prevented from being sales by retail by the circumstance that they are limited to those customers who comply with the condition regarding the purchase of other goods. Nor do I see any justification for the view that in such a case the price charged for the special line of goods should be treated as increased by some part of the price paid for other goods purchased in order to comply with the condition. In this imaginary case the shopkeeper no doubt gets a collateral advantage in the shape of the enhanced sales of other goods he effects or hopes to effect to customers seeking to comply with the condition and thus qualify themselves as purchasers of goods of the special line, just as in the actual case before the court the Nestlé Co. get a collateral advantage in the shape of the enhanced sales of chocolate resulting or hoped to result through the purchase of Nestlé's chocolate by persons wishing to acquire the wrappers necessary to qualify them as purchasers of records. But this collateral advantage does not in the actual case form part of the price of the record any more than it would in the imaginary case form part of the price of goods of the special line.

The plaintiffs' real complaint in the present case appears to me to be that 1s. 6d. per record is too cheap a price, yielding too small a royalty, and is not in fact the true price, because the Nestlé Co. can afford to let the records go cheap for the sake of the collateral advantage they get in the shape of increased sales of their chocolate. But any retailer of goods may get some collateral advantage from their sale without any such special arrangements as I have assumed in the case of my imaginary shopkeeper. For example, a novel and attractive line of goods may bring in customers who will buy other things as well, and may be stocked by a retailer with that very object in view rather

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than the actual profit he hopes to make from the sale of the goods themselves. As to the cheapness of the price of 1s. 6d. per record, this, according to the evidence, is made possible by the new and exceedingly cheap method of manufacture used by the Hardy Co. Moreover, according to the evidence this price shows the Nestlé Co. a profit, and I see no sufficient reason for regarding it otherwise than as the true price. It is moreover to be observed that the plaintiffs have no right to insist on the records being sold at any particular price or at a price showing a profit. If the Nestlé Co. had sold the records at 1s. 6d. or even less than that without any condition as to the production of wrappers, the plaintiffs admittedly would have had no ground for complaint, even though the records might be accompanied by matter advertising Nestlé's chocolate.

The view I have formed to the effect that 1s. 6d. is to be regarded as the price of a record, without any addition in respect of the condition as to wrappers, disposes of the plaintiffs' subsidiary argument to the effect that the prescribed notice given by the Hardy Co. pursuant to section 8 (1) (*b*) of the Act and paragraph 1 (1) of Statutory Instrument, 1957, No. 866, was defective, in that it did not and could not specify the ordinary retail selling price as required by paragraph 1 (1) (*f*) of the statutory instrument.

I should add that I likewise reject an argument raised on paragraph 3 of the Statutory Instrument which defines "The "ordinary retail selling price of a record" in these terms: "The "ordinary retail selling price of any record shall be calculated "at the marked or catalogued selling price of single records to the "public, or if there is no such marked or catalogued selling price, at "the highest price at which single records are ordinarily to be "sold to the public, exclusive of purchase tax in either case." The point taken here (in addition to the objection that 1s. 6d. was not the true price) was to the effect that the Nestlé Co.'s sales of records were not sales to the public, because of the condition as to wrappers. I see no sufficient reason for holding that this condition prevented such sales from being sales to "the public." I think "the public" in this context is used as meaning members of the public purchasing records for their own use as distinct from traders purchasing for re-sale. Nor can I regard it as right to treat that paragraph as qualifying the simple reference to sales by retail contained in section 8 (1) (*c*) of the Act itself.

For these reasons I would allow this appeal.

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ROMER L.J. It is with regret and diffidence that I feel constrained to differ from the judgments of my brethren on this appeal, but for my part I have reached the conclusion that the decision of Upjohn J. was correct and should be upheld. I can state my reasons for this view very shortly, because they are substantially the same as those expressed by the judge in his judgment.

The question is whether the sale by the Nestlé Co. of the records in question in this case can properly be regarded as sales " by retail " within the meaning of that phrase as used in section 8 (1) of the Copyright Act, 1956. The subsection has been read and I will not read it again, but I respectfully agree with, and adopt, the following passage in the judgment of the judge: " Referring back," he said, " to section 8 it is at once " apparent that the emphasis in the section (and in this it differs " from section 19 of the earlier Act) is upon ' retail sale.' In " paragraph (*a*) it is a necessary condition precedent, in fact " satisfied in this case, that records must have been imported or " made for the purpose of retail sale. Passing over paragraph " (*b*) which, as I have said, is satisfied subject to a point I shall " mention in a moment, paragraph (*c*) again stresses the retail " sale aspect of the matter because he has to state, if he is to " satisfy the section, that ' the manfacturer intends to sell the " ' record by retail, or to supply it for the purpose of its being " ' sold by retail by another person.' Then in (*d*) again there " is the reference that in the case of a record which is sold by " retail the manufacturer has to pay a royalty and, finally, in " subsection (2) there is a reference to the ordinary retail selling " price. It seems quite clear, therefore, that the question I have " to determine is whether this transaction can properly be " described as a retail sale, or whether it is the manufacturer's " intention to sell the record by retail."

In some sense it is quite true to say that the sale of the records by the Nestlé Co. is a sale by retail; for it is not a sale by wholesale but is a sale direct to the consumer, namely, the public. It appears to me, however, that the retail sales envisaged by the section are ordinary retail sales for cash, across the counter or in response to written orders, such as characterize, I suppose, the vast majority of purchases of gramophone records by members of the public. The reason why, in my opinion, it is ordinary retail sales, and those alone, which are within the contemplation of the section is that under subsection (2) of section 8 the royalty payable to the owner of the copyright is a percentage of "the "ordinary retail selling price of the record"; and I am unable to see how there can be an ordinary retail selling price in the absence of an ordinary retail sale. The issue, therefore, as it seems to me, is narrowed down to the question whether the sales by the Nestlé Co. Ltd. are ordinary retail sales.

The judge came to the conclusion that they are not, and I agree with him. It is quite true that the three chocolate wrappers which have to accompany each application for a record are intrinsically valueless and that the only money price which the customer has to send with his application is the sum of 1s. 6d. That sum, however, is not the only price which the customer has in fact to pay for the record; for he or one of his family or friends has to pay for three bars of the Nestlé Co.'s chocolate as well. This represents a profit to the company on each sale of a record in addition to the 1s. 6d. which they receive in cash. "The vital "part of this transaction," said the judge, "is to get in three "wrappers and that represents a great deal of value to Nestlé's, "because it is evidence of an advertising campaign pushing up "their sales. That is the value to them. This bears no resemblance at all to the transaction to which, in my judgment, the "section is pointing, that is, an ordinary retail sale with an "ordinary retail selling price. I think it is quite wrong to suppose "that the retail selling price here is 1s. 6d. The purchaser has to "purchase three bars of chocolate and that is the real value of "this transaction to Nestlé's."

I am in agreement with those views of the judge. I cannot help thinking that the owner of the copyright was entitled, under section 8, to a royalty assessed upon the full purchase price of each record sold by retail. Under Nestlé's method of selling them the copyright owner gets a royalty assessed upon the cash part only of each sale, and he gets nothing in respect of the consideration which, although indirect, passes from the customers and is received by the company; and the minimum royalty provision would, in many cases of transactions of this character, be no satisfactory substitute for the loss. The position would become still more unfavourable to the owner of the copyright if the company (which it might well do at any time) reduced the amount of cash payable by the customers and increased the number of the requisite wrappers.

In my judgment, the sales of the records in the manner in which they are carried out do not constitute sales "by retail" of the character envisaged and required by section 8 of the Act; and I would only add that it seems to me difficult, if not impossible, for the manufacturer to give, in relation to such sales, the particulars required by regulation 1 (*f*) of the statutory regulations.

I would, accordingly, dismiss the appeal.

Appeal allowed.
Leave to appeal.

Solicitors: *McKenna & Co.; Howe & Rake; Syrett & Sons.*

F. R. D.

1958
Feb. 11.

Danckwerts J.

In re CASTIGLIONE'S WILL TRUSTS.
HUNTER *v.* MACKENZIE AND OTHERS.

[1957 C. No. 1962.]

Company—Shareholder—Company itself—Direction in will to transfer company's own shares to company—Proposed transfer to nominees—Whether valid—Qualification of nominees.

A testator directed that 1,000 ordinary shares in C. E. & Co. Ltd. should be held on trust for his son for life, and if the son should die without issue the trustees of the will were to "transfer "them to C. E. & Co. Ltd. at the date of his death." There were certain restrictions on the transfer of shares in the articles of the company. On the death of the son without issue the court was asked to determine whether the shares should be transferred to nominees of the company (one of whom was qualified under the articles while the other was not), or whether they fell into the testator's residuary estate:—

Held, that although the company could not hold its own shares, since it could not be a member of itself, there could be a trust for the company under which certain persons, registered as holders of the shares, held them on trust for the company as beneficiary; accordingly, the company was entitled to direct that the shares should be transferred into the names of nominees, who must be properly qualified under the company's articles of association to hold its shares.

Kirby v. *Wilkins* [1929] 2 Ch. 444 and *Cree* v. *Somervail* (1879) 4 App.Cas. 648 applied.

In re Buckingham (1943) 170 L.T. 53 considered.

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CASTIGLIONE'S WILL TRUSTS, *In re.*

ADJOURNED SUMMONS.

Edward James Castiglione, at the date of his death on December 18, 1940, was the registered holder of 9,003 ordinary shares in Castiglione, Erskine & Co. Ltd., a private limited company, incorporated on January 17, 1922, to take over the business of estate agents previously carried on by the testator in partnership.

He made his will on October 25, 1940, at a time when he was in Scotland, and the will was not in the usual form of an English will, but the testator therein declared that he was domiciled in England. He appointed his son and his son-in-law executors and trustees thereof, and by the fourth to ninth directions inclusive, he directed his trustees to hold various parcels of his shares in the company on specific trusts for the benefit of his children.

The seventh direction, which is the material direction for the purposes of this report, was in the following terms: "To hold "1,000 shares in Castiglione, Erskine & Co. Ltd. in trust for the "liferent use of my son Austin Castiglione; I direct my trustees, "after his death, to divide these shares between his children who "survive him, or, should he die without lawful issue, to transfer "them to Castiglione, Erskine & Co. Ltd. at the date of his "death. . . ."

The rights relating to the transfer of shares in the company were regulated by article 4, which provided: "The right to "transfer shares in accordance with the provisions of Table A "shall be restricted as follows: . . . (B) Any share may be "transferred at any time by the holder to his or her wife or "husband, father or mother, or to any lineal descendant of such "father or mother, or to the wife or husband of any such lineal "descendant, or to the trustees for the time being of any "settlement made on the marriage of such member, or of any "person standing in such relation as aforesaid to such member, "for the purposes of such settlement, and any share of a "deceased holder thereof may be transferred by his executors or "administrators to the widow or widower of or any person "standing in such relation as aforesaid to such deceased holder, "being cestui que trust or specific legatee thereof, and shares "standing in the name of any deceased original holder thereof "may be transferred to or placed in the names of the trustees "of his will. Shares standing in the names of trustees of any "instrument, may, upon any change of trustees, be transferred "to the trustee for the time being of such instrument or to a "cestui que trust but not otherwise under the foregoing provisions. A share may at any time be transferred to any "member of the company."

Austin Castiglione died on March 12, 1956, without issue, and the court was asked to determine whether on his death and on the true construction of the testator's will the 1,000 ordinary shares in Castiglione, Erskine & Co. Ltd.: (a) ought to be transferred to David Thomson Nicholl Turner and John Kenneth Macrae as the nominees appointed by Castiglione, Erskine & Co. Ltd., or (b) ought to be held as part of the residuary estate of the testator, or (c) ought to be dealt with in some other way.

Turner was a member of the company, but Macrae was not.

Raymond Walton for the plaintiff, trustee of the will.

James FitzHugh for the second, third and fourth defendants, residuary legatees. This bequest was ineffective and the shares fall into residue. The will directs the transfer of these shares to the company: there are no words of gift apart from the direction to transfer, and a transfer to a company of its own shares, so as to make it the holder of its own shares, cannot lawfully be made. There is no direct decision on the question whether a bequest to a company of its own shares is valid. It is suggested in Jarman on Wills, 8th ed., vol. 2, p. 1055, that such a bequest might be effective, because although a company cannot hold its own shares, since it cannot be a member of itself, it could direct the shares to be held by nominees. This suggestion appears to be based on statements in *Cree* v. *Somervail*[1] and *Kirby* v. *Wilkins*.[2] Lord Hatherley said in the former case that shares bequeathed to a company might be vested in trustees who could hold them for its benefit. This dictum was accepted by Romer J. in *Kirby* v. *Wilkins*.[2] These cases were considered by Simonds J. in *In re Buckingham*,[3] where he expressed some doubt as to the correctness of Lord Hatherley's statement, but it was unnecessary in that case for Simonds J. to decide the question whether a bequest of shares to a company was valid. The law, therefore, as to this question remains open.

The testator here used the word "transfer," and it is perfectly clear that he intended the shares to be conveyed to the company. If the will is read as a whole, with the knowledge that the testator could have created a trust of the shares for the company, as suggested in *Cree* v. *Somervail*,[4] the intention of the testator on

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[1] (1879) 4 App.Cas. 648.

[2] [1929] 2 Ch. 444.

[3] (1943) 170 L.T. 53.

[4] 4 App.Cas. 648.

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the true construction of his will must have been to give the shares to the company itself, which is not allowed by law. There is no trust created in the present case, so it is distinguishable from *Kirby* v. *Wilkins.*[5] In any event, by article 4 of the company's articles of association the transfer cannot be made to the proposed nominees, as one of them is not a member of the company.

E. J. A. Freeman for the fifth defendant, Castiglione, Erskine & Co. Ltd. The bequest to the company is not invalid and should be construed as a direct gift to the company of the beneficial interest in the shares. A company may not purchase its own shares; it may not traffic in its shares; and it may not be a member of itself. But none of these rules will be infringed in the present case. The shares can be transferred to two other members of the company to hold them as nominees on behalf of the company. It is quite normal for the court to seek to give effect to a gift if it can do so legitimately, and the court will not allow the procedural restriction on the company holding its own shares to interfere with the beneficial gift. The procedure of a transfer to nominees to hold the shares for the benefit of the company would not violate the principle laid down in Buckley on the Companies Acts, 10th ed., p. 140, that a company must not purchase its own shares; and is within the dicta of *Cree* v. *Somervail*[6] and *Kirby* v. *Wilkins.*[7] Simonds J. in *In re Buckingham*[8] does no more than say that the question deserved consideration, and it was not necessary for him to come to any concluded decision on it in the case before him. His judgment, therefore, carries the matter no further. The court can, accordingly, direct that the shares should be held by nominees on the company's behalf, which would be within the dictum of Lord Hatherley in *Cree* v. *Somervail.*[9]

The first defendant, a residuary legatee, was not represented and did not appear.

DANCKWERTS J. In this case a point of some interest arises, which does not appear to have been decided hitherto, at any rate directly.

[His Lordship stated the facts and continued:] Austin Castiglione died on March 12, 1956, without leaving any issue, and accordingly the direction was effective to direct the trustees to transfer the shares to the company itself. The gifts to the other children were in rather similar terms, with directions in one case that the shares should "revert" to the company, and in another case that the shares should be "made over" to the company. I do not think that that makes very much difference.

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[5] [1929] 2 Ch. 444.

[6] 4 App.Cas. 648.

[7] [1929] 2 Ch. 444.

[8] 170 L.T. 53.

[9] 4 App.Cas. 648.

There is no doubt about the construction of the gift. It is plainly a direction requiring the trustees of the will to transfer the shares "to the company itself." It is contended that that is a direction contrary to law, which cannot therefore be carried out, and as a consequence that the shares in question fall into the ultimate residuary gift contained in the will.

In Jarman on Wills, 8th ed., vol. 2, p. 1055, there is a statement of the law in respect of this matter in the following terms: "The question whether a bequest of its own shares to a company "is valid appears never to have been decided, but there would "appear to be no reason why such a bequest should not be "effective. The company cannot, of course, be a member of "itself, but it could direct the shares to be held by nominees, "and such a transaction would not, it is suggested, offend against "any of the principles of company law." Three cases are referred to in the note: *Cree* v. *Somervail*,[1] *Kirby* v. *Wilkins*[2] and *In re Buckingham*.[3]

The principle which has been well established by the cases is well known, namely, that a company may not traffic in its own shares, which I take to mean that a company may not buy its own shares. The question is whether there is anything in that principle which would be offended against by the direction in the present will.

I need not go through the first of the cases mentioned in Jarman because the material parts of it are set out in *Kirby* v. *Wilkins*,[4] which came before Romer J. in 1929. In that case there was a sale by promoters of a company of a business for £16,000 to be satisfied by the allotment to the promoters of 16,000 fully paid shares in the company. Then it was discovered that the vendors had over-valued some of the assets of the company and voluntarily they agreed, the company having paid £3,000 more for the business than the sum which ought to have been paid, that the vendors would place at the disposal of the company 3,000 of the fully paid shares which were allotted to them. Those 3,000 shares were in due course transferred to Mr. Wilkins, the defendant in the action, who was chairman of

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[1] (1879) 4 App.Cas. 648.

[2] [1929] 2 Ch. 444.

[3] (1943) 170 L.T. 53.

[4] [1929] 2 Ch. 444.

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the board of directors, upon trust for the company. It was then claimed in an action against the chairman that he held the shares as trustee for the individual shareholders, and they sought an injunction restraining him from voting at any meeting of the company as the holder of the shares. Romer J. held [5] "that "the transfer did not offend against any principle laid down by "any of the decided cases, and that the transaction was not "made invalid by reason of the transfer having been made to a "nominee on trusts which involved an obligation on the trustee "to vote in respect of the shares as the company might from "time to time direct."

After referring to *Trevor* v. *Whitworth*,[6] Romer J. summarized the principles which arose from that case. Quoting from Buckley on the Companies Acts, 10th ed., p. 140, he said [7]: "'The "'grounds of the decision in *Trevor* v. *Whitworth* [8] and the "'principles which it affirms may be summarized thus: (1) Purchase by a company of its own shares is not forfeiture or "'surrender or anything like it. Forfeiture is valid, the Act "'recognizes it: the company parts with no money, but resumes "'dominion of a share upon which something has been paid, "'and this because a further payment cannot be obtained. "'Surrender may be valid, e.g., where the company could "'forfeit and the member dispenses with the formalities. Each "'case of surrender must be determined upon its merits. "'Where money is paid or consideration given by the company "'it is a purchase, and purchase is neither forfeiture nor "'surrender.' The reference there to consideration given by "the company as opposed to money paid by the company has "reference, no doubt, to the decision of the Court of Appeal in "*Bellerby's* case,[9] in which the Court of Appeal pointed out "that where shares are surrendered to a company which are not "fully paid up, and in consideration of the company purporting "to release the transferors or surrenderers from their further "liability in respect of the shares, it is in effect the equivalent "of a purchase by the company of its shares, and is invalid." Then he continued with the statement in Buckley [10]: "To go "on with the statement in Buckley on the Companies Acts the "second principle is stated to be this: '(2) The company cannot "'be a member of itself. (3) The purchase of its own shares

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[5] [1929] 2 Ch. 444.

[6] (1887) 12 App.Cas. 409; 3 T.L.R. 745.

[7] [1929] 2 Ch. 444, 447.

[8] 12 App.Cas. 409.

[9] [1902] 2 Ch. 14; 18 T.L.R. 582.

[10] [1929] 2 Ch. 444, 448.

" 'is a reduction of capital. The Act, in sanctioning reduction " 'of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions " 'and restrictions are observed. (4) The Act impliedly prohibits " 'the return of capital to members. The payment of capital " 'to one shareholder is just as much a reduction of capital and " 'just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably. " '(5) The transaction cannot be justified as "incidental" to " 'the company's objects, e.g. in a private company where it " 'is desired to keep the shares in the hands of a few. To the " 'creditor whose interests the Act intends to protect it makes " 'no difference what the object of the purchase is.' " Romer J. continued [11]: "Now, if that be a true statement of the principles "enunciated in the case of *Trevor* v. *Whitworth*,[12] and in my "view it is, adding perhaps thereto *Bellerby's* case,[13] it is difficult "to see which of those principles is infringed by the transfer "that has been made in the present case. The company has "not parted with one penny of its money, either in cash or "money's worth. The company does not become a member of "itself. The member of the company in respect of these 3,000 "shares is Mr. Wilkins, the defendant." Then he considered *Addison's* case,[14] to which I need not refer.

Then Romer J. referred to *Cree* v. *Somervail*,[15] one of the cases referred to in Jarman, and to a passage in the speech of Lord Hatherley in that case [16]: "There Lord Hatherley was "dealing with the possibility of shares in a company becoming "vested in a trustee for them without the company necessarily "becoming a purchaser of them, and he said this: 'As to their " 'being trustees for the company, that might be perfectly " 'legitimate and lawful, whatever view be taken of this case. " 'I am not, as I have said, pronouncing any opinion as to what " 'would have happened if the nature of the transaction had " 'been different, if it had been for the purpose of merging the " 'shares. But those shares might have become vested in a " 'variety of ways in trustees for the company, without their " 'being necessarily the purchasers of them. For instance, Mr. " 'Thomson by his own will might, if he had thought fit, or if " 'he had thought that such a course was desirable for his own

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[11] [1929] 2 Ch. 444, 448.
[12] 12 App.Cas. 409.
[13] [1902] 2 Ch. 14.
[14] (1870) L.R. 5 Ch. 294.
[15] 4 App.Cas. 648, 661.
[16] [1929] 2 Ch. 444, 450.

" 'purposes, have made a bequest of these very shares to certain " 'persons as trustees for the company, or he might have made " 'a bequest of them to the company itself, and the company " 'might have found trustees to hold the shares as trustees for " 'them, and to be answerable to third parties in respect of " 'them.' " Lord Hatherley seems to have considered a case which would cover the circumstances of the case with which I am here concerned. Then Romer J. said [17]: "It may be, however, and I think that in Buckley on the Companies Acts the "cases I have referred to are treated as authority for this, that "although a transfer of partly paid shares to a nominee of the "company leaves the transferor liable, because the company "cannot purchase its own shares, yet in the case last put the "transferee may himself be made liable. On the other hand I "cannot find in *Addison's* case [18] any clear authority for the "proposition that in the case of a transfer of fully paid shares "to a company without any consideration moving from the "company, the transfer is invalid." Romer J. eventually decided that the transfer of the shares in the case before him did not offend against any principle which he had laid down.

Therefore, in the quotation from Lord Hatherley in *Cree* v. *Somervail*,[19] and in the statement of Romer J. himself, there are statements which indicate that a gift to a company of shares in the company itself does not offend against any rule of law.

On the other hand, in a case before Simonds J. of *In re Buckingham* [20] in 1943, there are some statements which do not altogether seem to accept the principles laid down by Romer J. and Lord Hatherley. In that case the testatrix made a bequest in the following terms [20]: " 'I bequeath my shares in the com- " 'pany of D., Limited, to the said O. to receive the income " 'derived therefrom during her lifetime—the shares to remain " 'the property of D., Limited.' At her death she owned 60 "preference shares of £10 each in D., Limited. Two questions "were raised: First, whether, as a matter of construction, there "was a gift of the reversionary interest in the shares to the "company; secondly, if there was such a gift, whether it was a "valid gift having regard to the rule of law that a company "cannot be a member of itself. Held, that subject to the life "interest of O. the shares were undisposed of. If there had been

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[17] [1929] 2 Ch. 444, 451.

[18] L.R. 5 Ch. 294.

[19] 4 App.Cas. 648.

[20] 170 L.T. 53.

"a valid bequest of the reversionary interest in the company, "the second question would have arisen. Notwithstanding the "dictum of Lord Hatherley in *Cree* v. *Somervail*,[21] that a testa-"tor might make a bequest of its own share to a company, which "was not disapproved by Romer J. . . . in *Kirby* v. *Wilkins*,[22] "this question required further consideration." Simonds J. said this [23]: "The question that I have to determine is whether there "is a valid bequest in reversion, after the life interest of Gladys "Mary Oswell, of the shares of the company of John Dobell, "Limited, to the company. Now there are two questions, first of "all a question of construction, namely: is there upon the true "construction of this will a gift of the reversionary interest in "the shares to the company? Secondly, if there is such a gift, "is it a valid gift, having regard to the rule of law that a "company cannot be a member of itself? I find it unnecessary "to consider the second, and as I think very difficult, question," which, I may observe, is the one that interests me today.

Simonds J. continued [23]: "... having given to this provision "the best consideration that I can, I find it impossible to say "that by the words, 'the shares to remain the property of John "'Dobell, Limited,' there is any sufficient indication of an "intention on the part of the testatrix to make a gift of the "shares." That was the end of the matter, but in the second paragraph of the page following Simonds J. said [24]: "There is "a life interest in the shares to Gladys Mary Oswell and, subject "to her life interest, the shares are not disposed of. If the "words were adequate to create a gift of reversionary interest, "I should have to consider the second question. Notwith-"standing the dictum of Lord Hatherley in *Cree* v. *Somervail* [25] "that a testator may bequeath its own shares to a company, "which dictum was approved, or at any rate not disapproved by "Romer J., as he then was, in *Kirby* v. *Wilkins*,[26] I think that "is a question which still deserves the consideration of the court "but it is unnecessary for me to do more than say that about it." When one reads the whole of that passage, Simonds J. seems to have had some doubt about it, and he does not really advance the matter any further, but merely leaves it open.

I have to consider the question in the present case on this state of the authorities. It seems to me that it is quite plain that a company cannot hold its own shares because it cannot be a member, but it does not necessarily follow from that that it may not have a beneficial interest arising from the shares in some way or other. It appears to me quite plain from the decision of Romer J. in *Kirby* v. *Wilkins*[27] that there can be a trust under which certain persons on the share register of the company may hold the shares upon trust for the company beneficially. I think that must be taken to be established by that case.

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[21] 4 App.Cas. 648.

[22] [1929] 2 Ch. 444.

[23] 170 L.T. 53.

[24] Ibid. 54.

[25] 4 App.Cas. 648, 661.

[26] [1929] 2 Ch. 444, 450.

In the present case the situation is that the shares are vested in the surviving trustees of the will. Therefore, at the moment, there is no rule of law which seems to be offended in the actual disposition of the shares. They are held upon trust for the company, and, as *Kirby* v. *Wilkins*[27] shows, that is entirely good in law.

On the other hand, what cannot be carried out is a transfer upon trust to the company itself of the shares in question. But is that an end of the matter? It does not seem to me that it is. I think that the person who is entitled to the benefit of the shares is entitled to direct that the shares should not be transferred to him directly but to any other person whom he shall name, and, if there is no other objection to the person to whom he directs the transfer, then the transfer may be good. Consequently, it seems to me that, in accordance with the principles laid down by Lord Hatherley and by Romer J., I must say that the company could direct a proper nominee to hold these shares for the company or as it should direct, and, therefore, the beneficial interest will be enjoyed by the company as in *Kirby* v. *Wilkins*,[28] so that the vote can be cast by the nominee at the meetings of the company as the company shall direct.

I have been careful, however, to say "proper nominee," because in this case the suggestion made by the company seems to me to be wrong. The company requested or suggested a transfer to be made to two gentlemen named Turner and Macrae. Turner is a member of the company, and Macrae is not. This being a private company, one finds, as one would expect, that there are restrictions on the transfer of shares. Clause 4 (2) of the company's articles of association restricts transfers in such a way as they are generally to be to members of the family. After mentioning various persons on the death of the deceased holder who stand in personal relationship to the deceased, the article says: "and shares standing in the name of any deceased

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[27] [1929] 2 Ch. 444.

[28] Ibid.

"original holder thereof may be transferred to or placed in the "names of the trustees of his will." So far, so good. It continues: "shares standing in the names of trustees of any "instrument may, upon any change of trustees, be transferred "to the trustees for the time being of such instrument or to a "cestui que trust but not otherwise under the foregoing pro- "visions." Accordingly, it appears that shares standing in the name of the trustees of the testator's will might on any change of trustees be transferred to the trustees for the time being of the will, and, other things being all right, they might eventually be transferred to a cestui que trust taking under the terms of the will. But in this case the company has been created the cestui que trust and that cannot be done because of the rule of law which does not permit of a company holding its own shares. Whether or not new trustees could be appointed limited to these particular shares of which Austin Castiglione was receiving the income need not be considered. It seems to me that the last sentence of this article shows the way in which nominees may properly be constituted, and it indicates that the shares may at any time be transferred to any member of the company. Accordingly, there appears to be no objection to a transfer into the name of Turner being directed by the company, though there might be an objection to a transfer into the name of Macrae. It seems to me that the article limits the selection which the company may make of the nominees into whose names the shares may be transferred, but otherwise a transfer of shares may be made to nominees.

I answer the first question in this fashion, that the company is entitled to demand a transfer of shares into the names of nominees properly qualified in accordance with the articles of association of the company.

Declaration accordingly.

Solicitors: *W. E. Wise & Son; Rising & Ravenscroft for Bernard Kuit, Steinart & Ashby, Manchester; Vivash Robinson & Co. for Harold G. Walker, Bournemouth; Linklaters & Paines.*

I. G. R. M.

1957
July 22,
25, 31.

Roxburgh J.

In re PHOENIX OIL AND TRANSPORT CO. LTD.

Company—Winding up—Contributories—Whether holder of fully paid shares a "contributory"—Dispensing with list of contributories—Adjustment of rights of contributories—Whether distribution of surplus assets an adjustment of rights—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 213, 257 (1).

In a compulsory winding up there were some 9,100 members, all holders of fully paid shares, entitled to rank pari passu in the distribution of surplus assets amounting to £640,000. On an application by the liquidator for an order that the settlement of a list of contributories be dispensed with:—

Held, that the holders of fully paid shares fell within the definition of "contributories" in section 213 of the Companies Act, 1948 (*In re Anglesea Colliery Co.* (1866) L.R. 1 Ch. 555 and *In re National Savings Bank Association* (1866) L.R. 1 Ch. 547 applied); but that the distribution of surplus assets did not of itself involve an adjustment of the rights of contributories, those contributories being holders of fully paid shares within the meaning of section 257 (1) of the Companies Act, 1948, and the court could and in the present case would dispense with the settlement of a list.

ADJOURNED SUMMONS.

By this summons dated June 20, 1957, the liquidator in the compulsory winding up of Phoenix Oil & Transport Co. Ltd. applied for an order that the settlement of a list of contributories be dispensed with.

The company was incorporated on June 24, 1920, with a nominal capital of £1,050,000 divided into one million £1 shares and one million 1s. shares. By January, 1939, the capital had been increased to £4,500,000 divided into 4,450,000 £1 shares and one million 1s. shares; 3,737,588 of the £1 shares and all the 1s. shares were issued and credited as fully paid up.

By an order of the court dated July 3, 1939, the capital was reduced to £2,150,680 by cancelling 13s. 4d. of the capital paid upon 3,523,980 of the issued £1 shares and reducing the nominal amount of each share to 6s. 8d. The issued shares were subdivided and consolidated and converted into £1,438,268 stock in accordance with the terms of a scheme of arrangement made between the company and its members. By a minute of the company, approved by the court, the capital was thus increased to its former amount of £4,500,000, being divided into £1,438,268 stock and 3,061,732 shares of £1, none of which had been issued. The capital remained unaltered on the date of the commencement of the winding-up proceedings. At the date of the liquidation there were 1,220 members or former members entitled between them to £174 0s. 2d., being the proceeds of sale of certain stock representing fractions of £1 to which members were entitled as a result of the reorganization, which these members or former members had failed to claim. There were also sums totalling £1,225 3s. 11d. due to 639 members or former members in respect of unclaimed dividends. Except for these sums of £174 0s. 2d. and £1,225 3s. 11d. and two debts to creditors who had not answered notices sent to them, all the liabilities of the company had been settled in full and the liquidator had in hand a surplus of approximately £640,000 available for distribution among the holders of the company's stock. There were approximately 9,100 members entitled to rank pari passu in the distribution of the surplus assets and the liquidator estimated that he would be able to make a return of 10s. on each £1 of stock held.

Arthur Bagnall for the liquidator. The proviso to section 257 of the Companies Act, 1948, confers on the court power to dispense with the settlement of a list of contributories where it will not be necessary to make calls on or adjust the rights of contributories. Adjusting rights and distributing assets are two separate processes. Where, as here, all that is involved is the distribution of surplus assets among one class of fully paid shareholders, there is no necessity to adjust their rights and the court may dispense with the settlement of a list.

"Contributory," as defined in section 213 of the Act, includes a holder of fully paid shares not because he is entitled to share in the adjustment of the rights of the contributories among themselves, but because the reference in section 213 is to every person who might in any circumstances be liable to contribute. That was the basis of the decision in *In re Anglesea Colliery Co.*[1] and in *In re National Savings Bank Association.*[2] The decision in *In re Aidall Ltd.*[3] that fully paid shareholders were not always contributories is inconsistent with those cases and was not followed in *In re Consolidated Goldfields of New Zealand Ltd.*[4] There is no principle in these decisions requiring the court to hold that "adjust rights" means "distribute assets." If that be the true construction of section 257, the requirements of the proviso are satisfied in this case and on the facts it is proper that an order dispensing with the settlement of a list of contributories should be made.

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[1] (1866) L.R. 1 Ch. 555.

[2] (1866) L.R. 1 Ch. 547.

[3] [1933] Ch. 323.

[4] [1953] Ch. 689; [1953] 1 All E.R. 791.

Denys Buckley as amicus curiae. The practice is to insist on the settlement of a list in any circumstances. Section 265 of the Companies Act, 1948, means that distribution is to be made by the court after the court has adjusted the rights of contributories. There is no question of the liquidator distributing on his own without the court. The only way that this section can be read together with section 245 is that the liquidator may do everything necessary to lead up to distribution of assets, then the court must either adjust rights or be satisfied that they do not need any adjustment, then proceed to distribute the assets.

[ROXBURGH J. If section 257 has the meaning for which Mr. Bagnall contends, what is there in section 265 to exclude that jurisdiction?]

The rule under section 265 for the court to make the distribution cannot be dispensed with and the court must be satisfied that it is making a distribution between the right people. The question is whether it is right in this particular case to dispense with the settlement of a list of contributories. The right course is not to dispense with it except perhaps in the most simple case of a couple of fully paid shareholders. The reason for the list is for the court to be satisfied that everything is done properly, because the court is the body that makes the ultimate distribution. Here there are over 9,000 members—the court must consider their relative positions. That is a good reason for saying that the obligation to settle a list is not lightly to be dispensed with. An application under section 257 to dispense with a list where there are many contributories is not the sort of case where the court, on general principles of public interest, should dispense with it.

Cur. adv. vult.

July 31. ROXBURGH J. read the following judgment: Section 257 (1) of the Companies Act, 1948, provides as follows: "As "soon as may be after making a winding-up order, the court "shall settle a list of contributories, with power to rectify the "register of members in all cases where rectification is required "in pursuance of this Act, and shall cause the assets of the "company to be collected, and applied in discharge of its "liabilities: Provided that, where it appears to the court that "it will not be necessary to make calls on or adjust the rights of "contributories, the court may dispense with the settlement of "a list of contributories." Section 213 defines a "contributory" as "every person liable to contribute to the assets of "a company in the event of its being wound up." Section 212 (1) (*d*) provides: "in the case of a company limited by "shares, no contribution shall be required from any member "exceeding the amount, if any, unpaid on the shares in respect "of which he is liable as a present or past member."

Any reader guilty of assuming that these sections mean what they say would, I think, infer: (1) that the list of contributories had to be made out reasonably soon after the winding-up order—in the present case seven years have elapsed, and I understand that this imperative direction is seldom carried out within the time envisaged by the Act; (2) that, as a holder of a fully paid share is not liable to contribute to the assets in the event of a winding up, he is not a "contributory" within the meaning of the Act. But such a conclusion would be wrong. Although Maugham J. held in *In re Aidall Ltd.*,[1] affirmed by the Court of Appeal, that the holder of a fully paid share fell sometimes, but not always, within the definition of a "contributory," the Court of Appeal in the earlier case *In re Anglesea Colliery Co.*[2] had held that he always did, and I followed the earlier decision in *In re Consolidated Goldfields of New Zealand Ltd.*[3] In further support of my decision, I now cite the Court of Appeal decision in *In re National Savings Bank Association.*[4]

It is clear, then, that a holder of fully paid shares is a "contributory"; but in the present case it is necessary to consider how that can be in the face of the definition, because there are two possible explanations. Section 265 provides: "The court "shall adjust the rights of the contributories among themselves "and distribute any surplus among the persons entitled thereto." Now one view of this section which has been submitted to me is that, as the proportions in which the persons entitled to surplus assets are to share in the same have to be ascertained by reference to their shareholdings, the distribution of the surplus assets of itself involves an adjustment of the rights of the contributories among themselves. But, in my judgment, this submission fails on several grounds: (1) The section, on the face of it, contemplates two processes and not one. (2) The apportionment

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[1] [1933] Ch. 323.

[2] (1866) L.R. 1 Ch. 555.

[3] [1953] Ch. 689; [1953] 1 All E.R. 791.

[4] (1866) L.R. 1 Ch. 547.

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of the surplus could not reasonably be described as an adjustment of the rights of the contributories among themselves, whereas the words precisely fit an adjustment between holders of fully and partly paid shares. (3) This explanation cannot be fitted onto the statutory definition of a contributory as one liable to contribute to the assets. (4) If correct, it would have been, but it was not, the ratio decidendi in the two cases (supra) in the Court of Appeal in 1866. It may be noted that both had been heard before judgment was given in either.

When Turner L.J. was considering the statutory definition of " contributory " in *In re National Savings Bank Association*,[5] he said[6]: " The section does not say ' contributory ' shall mean every " person liable to contribute to the assets, but every person " liable to contribute to the assets under this Act, which may " well mean every person liable under this Act to contribute." By this I understand the Lord Justice to mean liable, not in the events which have happened, but in the events which might happen, in the same way in which a certain college porch is named " Jumbo " because the college would have to keep an elephant there if it had one. Turner L.J. makes his meaning even clearer in *In re Anglesea Colliery Co.*[7] He says[8]: " Now " it seems to me to be clear, beyond all doubt, that the purpose " of the Act is, inter alia, to adjust the rights of all the members " of companies which should be wound up under it. Indeed, I " do not see how the rights of those members who have not paid " up in full could be adjusted without the rights of those members " who have paid up in full being taken into account." By this line of reasoning the statutory definition is expanded to mean every person who would be liable to contribute in any possible event under the Act. The importance of this analysis for the present purpose is that holders of fully paid shares do not become contributories because they are entitled to participate in surplus assets, but for another reason. Accordingly, there is no need to embark on further mental gymnastics in order to construe section 257. " Contributories " includes holders of fully paid shares. But if it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list, even though there is a surplus for distribution among holders of fully paid shares. That is the present case.

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[5] L.R. 1 Ch. 547.

[6] Ibid. 551.

[7] L.R. 1 Ch. 555.

[8] Ibid. 560.

Mr. Buckley, who as amicus curiae has greatly assisted the court, has rightly insisted that if this dispensing power were exercised without due reflection, serious misfortunes might befall in certain cases. That is true enough, and each case must depend upon its own facts. But I cannot resist pointing out the expensive absurdities which must result from a refusal to exercise the dispensing power in a simple case. There are in this case 9,100 members entitled to rank pari passu in the distribution of the surplus assets. First of all, under rule 81 of the Companies (Winding-Up) Rules, 1949, the liquidator must give to each of them notice in writing of the time and place appointed for the settlement of the list. On the day appointed he has to hear any person who objects to being placed on the list, although any shareholder who objected in the circumstances in which the dispensing power is exercisable would appear to be of doubtful sanity. Under rule 83, the liquidator has then to give 9,100 further notices, and under rule 85 the process may in certain circumstances have to be repeated all over again. Yet this expensive process seems to afford no safeguard at all against such dangers as may exist; for example, that a shareholder might be inadvertently excluded from the list by reference to which the notices are sent out and the distribution is to be made, or that a transfer of a share might have been effected which had not been registered.

I dispense with a list of contributories in the present case.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Solicitor, Board of Trade.*

P. P.

In re PHOENIX OIL AND TRANSPORT CO. LTD. (No. 2).

1957
Dec. 16, 20.

Wynn-Parry J.

[No. 00139 of 1950.]

Company — Winding up — Contributories — Compulsory winding up—Surplus assets—Register out of date—Distribution among contributories — Whether order of court necessary — Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 245 (1) (2) (*h*), 265, 302, 303 (2)—*Companies* (*Winding-up*) *Rules,* 1949 (*S.I.* 1949, *No.* 330 (*L.*4)).

In the compulsory winding up of a company under an order of the court made in 1950, the liquidator had surplus assets sufficient to pay 10s. 2d. per £1 of stock held. There were some 9,100 stockholders on the register, which was now some seven years out of date. On July 31, 1957, the court made an order dispensing with the settlement of a list of contributories: ante, p. 560; [1957] 3 All E.R. 218. In the present summons the liquidator asked that it might be determined whether, on the true construction of the Companies Act, 1948, and in the events which had happened, he was entitled to distribute the surplus assets of the company amongst the contributories in accordance with their respective rights thereto. Alternatively, he asked that he might be at liberty to make a return of capital at the rate of 10s. 2d. per £1 of stock held to the contributories, on the ground that rule 120 of the Companies (Winding-up) Rules, 1949, gave the court a discretion to allow him to make a distribution before an inquiry was made in respect of contributories:—

Held, (1) that the court exercised a much greater degree of control in a compulsory winding up than in a voluntary winding up, and the operative section relating to a compulsory winding up, section 265, required an order of the court before the liquidator was entitled to distribute the assets, whether or not any adjustment had to be made among the contributories.

(2) That although the court might, under rule 120, in a suitable case dispense with certain requirements, this was not a case where it would authorize the liquidator to make a return of capital before he had made an inquiry as to the persons entitled, which he had to do at some stage before he was able to ascertain among whom the surplus should be distributed.

ADJOURNED SUMMONS.

The liquidator in the compulsory winding up of Phoenix Oil and Transport Co. Ltd. by this further summons, dated November 22, 1957, asked the court to determine questions relating to the distribution of surplus assets.

The company was incorporated on June 24, 1920, with a nominal capital of £1,050,000, which by January, 1939, had been increased to £4,500,000. By an order of the court dated July 3, 1939, the capital was reduced to £2,150,680 by cancelling 13s. 4d. of the capital paid upon 3,523,980 of the issued £1 shares and reducing the nominal amount of each share to 6s. 8d. The issued shares were subdivided and consolidated and converted into £1,438,268 stock in accordance with the terms of a scheme of arrangement made between the company and its members. By a minute of the company, approved by the court, the capital was thus increased to its former amount of £4,500,000, being divided into £1,438,268 stock and 3,061,732 shares of £1, none of which had been issued. The company was ordered to be wound up on its own petition by an order of the court, dated

February 27, 1950, when the capital remained unaltered from the above figures.

At the date of the liquidation there were 1,220 members or former members entitled between them to £174 0s. 2d., being the proceeds of sale of certain stock representing fractions of £1 to which members were entitled as a result of the reorganization, which these members or former members had failed to claim. There were also sums totalling £1,225 3s. 11d. due to 639 members or former members in respect of unclaimed dividends. Except for these sums of £174 0s. 2d. and £1,225 3s. 11d. and two debts to creditors who had not answered notices sent to them, all the liabilities of the company had been settled in full and the liquidator had in hand a surplus of approximately £640,000 available for distribution among the holders of the company's stock. There were approximately 9,100 members on the register entitled to rank pari passu in the distribution of the surplus assets and the liquidator estimated that he would be able to make a return of 10s. 2d. on each £1 of stock held. The register was now, however, some seven years out of date.

Roxburgh J., on July 31, 1957,[1] held that the holders of fully paid shares fell within the definition of "contributories" in section 213 of the Companies Act, 1948, but that the distribution of surplus assets did not of itself involve an adjustment of the rights of contributories, as those contributories were holders of fully paid shares within the meaning of section 257 (1) of the Companies Act, 1948, and the court could and in the present case would dispense with the settlement of a list.

The questions on the present summons of November 22, 1957, relevant to this report were questions (2) and (3), namely: (2) that it might be determined whether upon the true construction of the Companies Act, 1948, and in the events which had happened, the liquidator was entitled to distribute the surplus assets of the company amongst the contributories in accordance with their respective rights thereto as such contributories without further order. Alternatively, (3) that the liquidator might be at liberty to make a return of capital at the rate of 10s. 2d. per £1 of stock held.

R. O. Wilberforce Q.C. and *Arthur Bagnall* for the liquidator. The question at issue depends on the true construction of sections 245 (2) (*h*) and 265 of the Companies Act, 1948: the distribution of surplus assets is one of the " other things " which the liquidator has power to do under section 245 (2) (*h*). No express statutory direction is required to authorize distribution of surplus assets among shareholders; the right to such a distribution is inherent in the nature of a share: *Birch* v. *Cropper*.[2] Section 265 applies only where an adjustment of rights is necessary, in which case both adjustment and distribution of surplus assets is to be carried out by the court. If the first of those operations is not required, the court is not concerned with the second operation unless its control is invoked under section 245 (3).

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[1] Ante, p. 560; [1957] 3 All E.R. 218.

Section 302, which deals with a voluntary winding up, requires surplus assets, unless the articles otherwise provide, to be distributed among the members according to their rights and interests in the company. These provisions apply unless there is an express provision in the articles for the payment of surplus assets to some other person or persons: *In re Merchant Navy Supply Association Ltd.*[3] The concluding words of section 302 are to be contrasted with the second part of section 265. If the latter section applies in all cases of compulsory winding up, even if no adjustment of rights is necessary, the destination of the surplus assets of a company whose articles precluded a distribution among members might depend upon whether the winding up was voluntary or compulsory. The restricted construction of section 265, which it is submitted is the correct construction, would avoid that apparent absurdity.

If the answer to question (2) be in the negative, the court has a discretion under rule 120 of the Companies (Winding-up) Rules, 1949, to make the order sought under question (3); the words in that rule " unless the court shall otherwise direct " confer on the court a wide discretion to dispense with any prescribed formality that it thinks fit.

Denys Buckley for the Board of Trade. Section 265 is the operative section in respect of the distribution of assets in a compulsory winding up; section 245 (2) (*h*) is merely the general provision which comes at the end of the list of functions to be performed by the liquidator. Section 265 is mandatory in form; it directs the court to make an order adjusting any rights among contributories and also to make distributions of any surplus assets. The restricted meaning which is contended for on behalf of the liquidator would have the odd result that the question whether or not the court could make an order for the distribution of assets would depend on whether there had to be an adjustment of rights among contributories.

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[2] (1889) 14 App.Cas. 525; 5 T.L.R. 722.

[3] [1947] 1 All E.R. 894.

Such a construction is contrary to the scheme of the Act, which provides for a greater degree of control for the court in a compulsory winding up than in a voluntary winding up. The practice of the Board of Trade has for a very long time been to insist on the liquidator obtaining an order of the court before he makes a distribution of the assets of a company in a compulsory liquidation. This is a practice which affords proper protection for the Board of Trade. The order sought is contrary to the established practice and should not be acceded to.

The general discretion in rule 120 of the Companies (Winding-up) Rules, 1949, is not intended to override the general policy of the Act in regard to distribution of assets, which is clearly stated in section 265. This is not the sort of case where at some stage an inquiry is necessary in which the court should exercise its discretion to allow a distribution before the inquiry is made as to who is entitled to the assets.

Cur. adv. vult.

Dec. 20. WYNN-PARRY J. read the following judgment. As Mr. Wilberforce said in opening the summons on behalf of the liquidator, the point raised by question (2) is a new one, and is entirely uncovered by authority. It is, however, a short point.

The company was on its own petition ordered to be wound up by the court by order dated February 27, 1950. At that time it was thought to be insolvent, but, in the events which have happened, the liquidator has a large surplus in his hands available for distribution amongst the contributories. There is issued £1,438,268 of stock held, so far as the register of members is concerned, by 9,100 stockholders, and there is sufficient money available to make a payment at the rate of 10s. 2d. in the £ to those who may now be entitled. The difficulty which arises is that the register is at least seven years or more out of date, and it is clear that no distribution can be made on the basis of the register as it now stands.

On July 31, 1957, Roxburgh J. made an order, on a summons taken out by the liquidator in the liquidation, dispensing with the settlement of a list of contributories. His decision is reported: *In re Phoenix Oil and Transport Co. Ltd.*[1] The basis of his decision was that the distribution of surplus assets does not of itself involve an adjustment of the rights of contributories, and that in the circumstances of the case the court should and would dispense with the settlement of a list.

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[1] Ante, p. 560.

At the present time, and for a very long time past, it has been the practice of the court in the case of a compulsory winding up to control the making and distribution of surplus assets among those entitled thereto by requiring the liquidator to bring in at the appropriate time, when he asks for an order for distribution, a list of those who, he says, are entitled, verified by affidavit. The Board of Trade has insisted on this practice, because, as Mr. Buckley, who appeared for the Board of Trade, said, the order of the court which is involved affords proper protection to the Board of Trade, who, upon the making of the order, then ask the Bank of England to draw the necessary cheques.

On this summons, however, Mr. Wilberforce, on behalf of the liquidator, has challenged the necessity for this practice, and has contended that in a compulsory winding up the liquidator is free to make a distribution (that is, to require the Bank of England to make the necessary payments) without the necessity of obtaining any order from this court.

A study of the relevant sections of the Companies Act, 1948, dealing with winding up shows clearly that as regards voluntary winding up the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding up. The reason is not far to seek. In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors' liquidation, the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members' voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise. In the case of a winding up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control.

It is against this background, in my view, that the relevant sections of the Companies Act, 1948, should be considered. In a voluntary winding up it is the liquidator who, without any reference to the court, is charged with the duty of distributing the assets among the members: section 302; and also has the duty of adjusting the rights of the contributories among themselves: section 303 (2). In the case of compulsory liquidation the relevant sections appear to me to be section 245 (2) (*h*) and section 265. Section 245 (2) reads: "The liquidator in a "winding up by the court shall have power— . . . (*h*) to do all "such other things as may be necessary for winding up the affairs "of the company and distributing its assets."

Mr. Wilberforce submitted that if that were the only provision in the Act relating to distribution of assets, the necessary conclusion would follow that the liquidator in a compulsory winding up has power to distribute the surplus assets among those entitled without the necessity of obtaining any order of the court or the committee of inspection: see the opening words of section 245 (1): "The liquidator in a winding up by the court shall have power, "with the sanction either of the court or of the committee of "inspection,—. . ." I should feel constrained to agree with this submission if section 245 (2) (*h*) were the only provision in the Act relating to distribution of assets, but solely because it was the only provision. Taken by itself it does not appear to me to be couched in very appropriate language for the purpose for which Mr. Wilberforce seeks to use it. To my mind it is properly to be regarded as a mopping-up provision at the end of a list of functions which the liquidator is enabled to perform in connexion with the administration of the particular company's affairs and no more. Paragraph (*h*) is in very general terms and does not indicate among whom the assets are to be distributed nor how they are to be ascertained. The other relevant section, section 265, reads as follows: "The court shall adjust the rights of the con-"tributories among themselves and distribute any surplus among "the persons entitled thereto." Prima facie, this section directs the court to do two things: first, to adjust the rights of contributories among themselves and then to distribute any surplus among the persons entitled. It is argued, however, by Mr. Wilberforce that the direction to the court to distribute any surplus only comes into operation if an adjustment among the contributories has first to be made. I am unable to accept this construction. The section is mandatory and I read it as meaning that the court is to make an adjustment among the contributories, if that be necessary, and after having done that, if it be required, it is then to proceed to make the distribution contemplated. I can see no good sense in the limited construction contended for. It would have this odd result: if no adjustment among the contributories were required, then the distribution would be made by the liquidator under section 245 (2) (*h*) without any reference to the court; whereas, if adjustment were required, an act which only in exceptional circumstances could be expected to involve difficulty, then the distribution would have to be made by the court. In my view, section 265 is the only operative section as regards actual distribution, and it applies whether or not an adjustment among the contributories is required. I therefore answer question (2) in the negative.

Question (3) is raised upon the basis that the answer to question (2) is, as I have decided, in the negative. It is then sought to invoke certain words in rule 120 of the Winding-up Rules,[2] which, it is said, in effect confer a discretion on the court, the exercise of which in favour of the liquidator would enable him to make the proposed distribution of 10s. 2d. without any further order of the court. It is quite clear that, having regard to the lapse of time since the order for winding up in 1950, no distribution could be made upon the basis of the register as it stands. Something in the nature of an inquiry as to who are the persons entitled to the surplus assets must be made by the liquidator at some stage. The sole remaining question, therefore, is whether in advance of that inquiry the liquidator should be authorized by an order under question (3) of the summons to distribute to those persons whom he finds entitled on making the inquiry, or whether he should first make the inquiry, and then, following the normal practice, apply for leave to distribute to the persons found entitled, whose names will appear in a list exhibited to a short affidavit in support of his application.

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[2] Companies (Winding-up) Rules, 1949, r. 120: "Every order by which "the liquidator in a winding-up by "the court is authorized to make a "return to contributories of the com- "pany shall, unless the court shall "otherwise direct, contain or have "appended thereto a schedule or list "(which the liquidator shall prepare) "setting out in a tabular form the full "names and addresses of the persons "to whom the return is to be paid, "and the amount of money payable to "each person, and particulars of the "transfers of shares (if any) which "have been made or the variations in "the list of contributories which have "arisen since the date of the settle- "ment of the list of contributories and "such other information as may be "requisite to enable the return to be "made. The schedule or list shall "be in the Form 70 in the appendix "with such variations as circum- "stances shall require, and the liqui- "dator shall send a notice of return "to each contributory."

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Wynn-Parry J.

I confess that I cannot help approaching a consideration of rule 120 without having in mind what I have said in considering question (2) of the summons, and that, therefore, I should want a very clear indication in rule 120 that the legislature had in the Winding-up Rules reversed or varied a policy which, so far as I am concerned, I find clearly stated in the body of the Act. [His Lordship read rule 120 and continued:] That rule begins by presupposing that an order of the court is required in the case of a distribution in a winding up by the court. The rule then proceeds to require that the order shall contain, or have appended to it, a schedule or list containing the particulars set out in the rule. That is the normal case. There is, however, a proviso, "unless "the court shall otherwise direct." I can conceive that in a simple case the court might be persuaded to dispense with some of the particulars mentioned in the rule, but I can see no justification for doing so in a case like the present, where, ex concessis, not only has there not been a settled list of contributories but the liquidator is faced with, as I have put it, something in the nature of an inquiry before he can say among whom the surplus should be distributed. I am unable to see that what I am asked to do would achieve anything more than putting the cart before the horse, an activity in which I am unwilling to indulge. Nor am I able to agree that by refusing to do what I am asked to do under question (3) I am taking a course—the normal course—which will increase the costs of the liquidation, except to the extent of the costs involved in applying to the court for an order giving leave to distribute on the basis of the list, which must at some time be compiled. As I said in argument, the difficulty in which the liquidator finds himself, if it be a difficulty, may well be due to his success in obtaining the order dispensing with a list of contributories. I make no order on question (3) of the summons.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Solicitor, Board of Trade.*

I. G. R. M.

1957
July 30, 31.

Vaisey J.

C. A.

1957
Nov. 22, 25, 27, 28;
Dec. 16.

Lord Evershed M.R., Romer and Ormerod L.JJ.

BROWNSEA HAVEN PROPERTIES LTD. *v.* POOLE CORPORATION.

[1957 B. No. 1839.]

Local Government—Powers—Highway—Creation of one-way street—Power under early Act—"Route to be observed"—"Public processions, rejoicings or illuminations"—"And in any case"—Limited power under later Act—No order by Minister under later Act—Whether order valid—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 21*—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 46 (1) *and* (2), *as amended by Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 29 (4).

Highway—One-way street.

Solicitor—Treasury Solicitor—Appearance on behalf of private individual—Whether Crown sufficiently interested in subject-matter of litigation. Crown Proceedings.

Ejusdem generis rule — Statute — "Public processions, rejoicings or "illuminations"—Instances constituting genus—Following general words "and in any case."

Judicial Precedent — Decision long undisturbed — Conflict of judicial opinion — Divisional Court decisions — Wrong construction of penal statutory provision—Stare decisis—Whether applicable—No injustice in overruling.

By an order dated March 5, 1957, and purporting to be made under section 21 of the Town Police Clauses Act, 1847,[1] the defendant corporation required that from April 19 to October 19, 1957, all vehicles using a certain road within the borough should observe a route in one direction only. The defendants had earlier made an application to the Minister of Transport for an order under the Road Traffic Act, 1930, s. 46 (2), making the road a one-way street, and that application had been refused. The order dated March 5, 1957, was, therefore, made by the defendants with a view to its continuance in force for a trial period and a further application to the Minister at a later date for an order under the Road Traffic Act, 1930, s. 46 (2). The plaintiffs, who owned an hotel situate on the road in question, sought a declaration that the order dated March 5, 1957, was ultra vires.

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[1] Town Police Clauses Act, 1847, s. 21: "The commissioners may from "time to time make orders for the "route to be observed by all carts, "carriages, horses, and persons, and "for preventing obstruction of the "streets within the limits of the "special Act, in all times of public "processions, rejoicings, or illumina-"tions, and in any case when the "streets are thronged or liable to be "obstructed, and may also give direc-"tions to the constables for keeping "order and preventing any obstruc-"tion of the streets in the neighbour-"hood of theatres and other places "of public resort, and every wilful "breach of any such order shall be "deemed a separate offence against "this Act, and every person com-"mitting any such offence shall be "liable to a penalty not exceeding 40 "shillings."

Vaisey J. held that on the true construction of section 21 of the Town Police Clauses Act, 1847, and section 46 (2) of the Road Traffic Act, 1930, it was not open to the defendants to make an order under the former section creating a one-way street for a trial period without any form of local inquiry and pending an application to the Minister for an order under section 46 (2); and that, accordingly, the order was void and ultra vires.

On the appeal, counsel acting for the defendants was instructed by the Treasury Solicitor and the plaintiffs took the preliminary point that the defendants' counsel had been instructed by a solicitor who had no practising certificate. It was not disputed that the Treasury Solicitor might properly offer his services to a private individual in a case in which the Crown had an interest in the subject-matter of the litigation, but it was said that the Crown had no interest because the particular order had expired by effluxion of time and the only live issue remaining was as to an award of costs:—

Held, by the Court of Appeal, (1) that although the mere ipse dixit of a Minister of the Crown that the Crown had an interest in the subject-matter of the litigation would not suffice to justify the intervention of the Treasury Solicitor, it was clear that in the present case the Crown was sufficiently concerned. Traffic control was a matter of national concern and the real question at issue was whether a broad class of local authorities could make orders of this type of their own volition under the Act of 1847, or whether the orders could only be competently made under more recent legislation, which required that the orders should be confirmed by the Minister of Transport. Notwithstanding the expiry of the particular order, that issue remained on foot and was a continuing matter of concern.

Rex v. *Archbishop of Canterbury* [1903] 1 K.B. 289; 19 T.L.R. 92 considered.

(2) That the words " route to be observed " in section 21 of the Act of 1847 should not be construed as confined to a route linking two termini available to traffic proceeding in either direction, but should include the ordering of traffic in a thoroughfare to observe " one direction " or " route " therein only.

(3) That the expression " in any case " in the context of the section should be construed in accordance with the rule known as the " ejusdem generis " rule of construction as intended only to cover cases of the same class or genus as the three preceding instances, " public processions, rejoicings or illuminations." Even if the genus was not confined to instances strictly similar to those three, the expression covered only cases of traffic dislocation of a special, particular or extraordinary kind, conditions likely to attract a crowd, and ought not to be treated as covering the circumstances of ordinary day-to-day traffic conditions.

Ejusdem generis rule stated in *Tillmanns & Co.* v. *S.S. Knutsford Ltd.* [1908] 2 K.B. 385, 404; 24 T.L.R. 454 (affirmed sub nom. *S.S. Knutsford Ltd.* v. *Tillmanns & Co.* [1908] A.C. 406; 24 T.L.R. 786) applied.

(4) That, apart from that rule, the word " case " was apt in the context of section 21 to refer only to particular and special

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occasions or events, and not to the ordinary and recurrent day-to-day conditions of particular thoroughfares.

Teale v. *Williams* [1914] 3 K.B. 395; *Edwards* v. *Wanstall* (1929) 142 L.T. 288; 46 T.L.R. 101 and *Etherington* v. *Carter* [1937] 2 All E.R. 528, in so far as they decided that the words "in "any case," etc., were intended or were apt to confer the widest possible powers on the local authority, disapproved.

(5) That to the extent that these decisions of the Divisional Court rested on the wrong construction of a penal provision, they should be overruled having regard (i) to the expression of contrary judicial opinion in the first and second of the cases, (ii) to the absence of any effect on property rights or titles if the construction were to be revised, and (iii) to the existence of other statutory powers of making orders of the type in question under section 46 of the Road Traffic Act, subject only to ministerial approval being obtained.

Rule in *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [1937] 2 K.B. 445; 53 T.L.R. 609; [1937] 2 All E.R. 298 (affirmed sub nom. *Robinson Brothers (Brewers) Ltd.* v. *Durham County Assessment Committee* [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79) and *Bourne* v. *Keane* [1919] A.C. 815; 35 T.L.R. 560 applied.

(6) That, on the facts, the holiday season at Poole was not an "event" comparable to "public processions, rejoicings or "illuminations"; and that the appeal should accordingly be dismissed.

Decision of Vaisey J. affirmed on other grounds.

ADJOURNED SUMMONS.

On March 5, 1957, the defendants, Poole Corporation, in purported exercise of section 21 of the Town Police Clauses Act, 1847, made the following order:

"Borough and County of the Town of Poole.

"The Town Police Clauses Act, 1847, s. 21.

"Order made by the Poole Borough Council for the routes to "be observed by vehicles. Whereas the streets to which this "order applies are during certain seasons of the year thronged "and liable to be obstructed: Unless upon the direction or with "the permission of a police officer in uniform, from April 19, "1957, to October 19, 1957 (both dates inclusive)—the route to "be observed by all vehicles in (i) Banks Road between its "junctions with Panorama Road shall be towards their south-west "junction and (ii) Panorama Road shall be towards its north-"east junction with Banks Road. For the purposes of this "order 'vehicle' includes bicycles and similar machines whether "mechanically propelled or not. All constables are hereby "directed to enforce the provisions of this order." The order was signed by the mayor and town clerk.

The defendants had previously made an application to the Minister of Transport for an order under section 46 (2) of the Road Traffic Act, 1930, making Banks Road and Panorama Road a one-way street, but this application had been refused. Prior to the making of the order dated March 5, 1957, there had been no local inquiry of any sort. The plaintiff company, who owned an hotel situate on Banks Road, applied by originating summons for a declaration that the order of March 5, 1957, was ultra vires and void.

G. D. Squibb Q.C. and *Jeremiah Harman* for the plaintiffs. The defendants' order is outside the scope of section 21 of the Town Police Clauses Act, 1847, because it does not amount to prescribing " a route to be observed " by vehicles as that phrase should be construed. The word " route " in section 21 is used exclusively in the same sense as in the phrase " bus route," meaning the course used by vehicles in proceeding from one terminus to another regardless of the direction to be followed. This is the meaning given to the word " route " by the Judicial Committee of the Privy Council in *Kelani Valley Motor Transit Co. Ltd.* v. *Colombo-Ratnapura Omnibus Co. Ltd.*[2] The words " orders for the route to be observed " were never intended to mean orders permitting a vehicle entering a street at any point to travel in one direction only; in 1847 a one-way street as a means of controlling traffic congestion was never thought of. It is an entirely modern conception since heavy motor traffic came into existence. It is not open to the defendants to use powers conferred by section 21 without any form of local inquiry in a purely experimental way. The order is ultra vires.

John Arnold for the defendant corporation. Section 21 of the Town Police Clauses Act, 1847, has general application and is wide enough to justify the order in the present case. The section empowers the local authority to prescribe the route to be observed; that means that it may limit traffic to a certain direction which may be any direction. The plaintiffs have contended that " route to be observed " means the course to be followed by vehicles between point A and point B. That must depend on the construction of the word " route." The plaintiffs rely on the *Kelani Valley* case,[3] but that is distinguishable; it deals with the route to be observed by a particular vehicle and is not concerned with relieving traffic congestion. The natural meaning of the word "route" is not limited to a way between two termini, and it can mean the flow of traffic in a particular direction.

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[2] [1946] A.C. 338, 346; 62 T.L.R. 459.

[3] [1946] A.C. 338.

[Vaisey J. If the local authority has power to do everything under section 21, what is the point of section 46 of the Road Traffic Act, 1930?]

Section 46 deals with a wider class of local authorities than section 21. If the effect of section 46 were, by implication, to limit the application of section 21, a very clear reference to section 21 would be needed. If section 21 is wide enough to justify an order making a one-way street, the order is good notwithstanding anything in section 46; and if it is not wide enough, then section 46 cannot affect it.

There has been a tendency in the cases not to limit the operation of the Town Police Clauses Act: see *Dudderidge* v. *Rawlings*,[4] *Cassell* v. *Jones*[5] and *Teale* v. *Williams*.[6] The power in section 21 being given to a local authority, it should be given a wide construction. If the order serves a useful purpose, the onus on the plaintiffs is very heavy.

Squibb Q.C. replied.

Vaisey J. stated the facts and continued: There are two sections which I have had to consider; section 21 of the Town Police Clauses Act, 1847, and section 46 (2) of the Road Traffic Act, 1930, as amended by the Road and Rail Traffic Act, 1933, s. 27 (4). Those sections are to some extent overlapping sections, but they differ in important respects to which I must now refer. The marginal note to section 21 is: "Power "to make orders for preventing obstructions in the streets "during public processions, etc." That power, which is not very accurately summarized in the marginal note, can be exercised in the Borough of Poole by the Poole Corporation, the defendants. Originally the power was given to commissioners, but with the subsequent variation it reads thus: "The Corpora-"tion may from time to time make orders for the route to be "observed by all carts, carriages, horses, and persons, and for "preventing obstruction of the streets within the limits of the "special Act [that is, within the limits of the Corporation's "jurisdiction] in all times of public processions, rejoicings, or "illuminations, and in any case when the streets are thronged "or liable to be obstructed, and may also give directions to the "constables for keeping order and preventing any obstruction of

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[4] (1912) 108 L.T. 802.

[5] (1913) 108 L.T. 806.

[6] [1914] 3 K.B. 395.

"the streets in the neighbourhood of theatres and other places "of public resort, and every wilful breach of any such order shall "be deemed a separate offence" under the Act, making the person who is guilty of it liable to a penalty. That section has been considered on many occasions by the courts; and one of the things which has been decided is that the reference to "processions, rejoicings" and "illuminations" does not limit the operation of the section, and it applies to all cases of crowding in the streets. I need not refer to the authorities which have been cited to me, except to observe that throughout there has been a tendency not to limit the operation of this section, and that the courts have thought that, these being powers which were entrusted to local authorities, they ought to be given a wide construction. In 1847, so far as counsel have been able to discover, the one-way street as such was not the familiar phenomenon which it is today, but it may well be that to some extent the creation of a one-way route for particular purposes was within the powers of the local authority under section 21.

I must now turn to section 46 of the Road Traffic Act, 1930, which, having regard to the one subsequent amendment to it, is to this effect: "(1) The Corporation, with the approval of the "Minister [of Transport] may, after holding, if he thinks fit, a "public inquiry, by order prohibit or restrict [subject to certain "exceptions] the driving of vehicles or of any special class or "description of vehicles on any specified road within the area "of the council in any case in which the council, with the approval "of the Minister, is satisfied that such vehicles cannot be used or "cannot without restriction be used without endangering the "safety of other vehicles. . . . (2) The Minister may on the "application of a council to which this section applies [it is now "council may with the consent of the Minister] make an order "for any of the following purposes—(*a*) the specification of the "routes to be followed by vehicles. . . ." Pausing there, that seems to me to be exactly what section 21 has already stated. "(*b*) The prohibition or restriction of the use of specified roads "by vehicles of any specified class or description, either generally "or during particular hours; (*c*) the prohibition of the driving of "vehicles on any specified road otherwise than in a specified "direction; (*d*) otherwise in relation to the regulation of traffic."

The substantial difference between that section and section 21 is this: the order must be one which the Minister has approved, and which, as I understand it, he will frequently not approve until he has held an inquiry or invited representations on the subject;

whereas section 21 provides for something which could be done on the undivided and unrestricted authority of the local council.

This order prohibits the driving of vehicles on a specified road, that is to say, Banks Road and Panorama Road, otherwise than in a specified direction; and there is no doubt that section 46 contemplates the creation of one-way streets by the appropriate authority acting with the appropriate consent. When the Minister was approached by the defendants and told what they wanted to do, the Minister intimated that he was not satisfied that the creation of a one-way street along this route was desirable, and, therefore, was not prepared to make or authorize the making of an order under section 46. However, the letter which was written by the Minister to the defendants stated: "Under the powers "contained in section 21 of the Town Police Clauses Act, 1847, "a council, through the Police, can institute any system of traffic "regulation they may consider to be necessary for a trial period."

I feel that to assume that section 21 of the Town Police Clauses Act, 1847, has been left on the statute book as an adjunct to section 46 of the Road Traffic Act, 1930, and to say that it can properly be used by a council without any local inquiry or restriction, in an experimental way before an order shall be made under section 46, is making a use of section 21 which I do not think should upon its true construction be allowed. I agree that it would be very useful to see how it works; but the plaintiff company, acting by its chairman, object to this one-way street. The plaintiffs' hotel, being situate about halfway along this one-way street, would be put to considerable inconvenience. It may be that the plaintiffs' objections will be overridden when they have been heard and considered. However, to turn these roads into a one-way street under the unrestricted powers of section 21 seems to me to disregard to an unwarranted extent the later section 46 with all the safeguards which it contains and the entirely different procedure and different responsibilities which it creates. Under section 46 the council can do nothing without the approval of the Minister; under section 21 they can do what they like. Under section 46, the Minister, representing the public, would, I imagine, say that if there were any general objection to the scheme there would be a local inquiry, or that those affected would be invited to make their representations before the order was made. It is going rather far to say that whenever an order as to a one-way street under section 46 is contemplated, it is always permissible to try it out for six months without permission from anybody. I think that makes a dangerous precedent.

If I were to decide that this method of procedure was desirable and permissible, any council could say: "We want an order "under section 46, but, in order to pave the way and show what "an excellent thing it is, we will put into operation a one-way "street under section 21, and if we do that and it works, then "the Minister will not withhold his consent." I do not think that procedure is one which the legislature, in the two sections to which I have referred, fairly construed, ever contemplated.

I am unable to say that this order made by the defendants under section 21 was within the corporation's powers because I do not think that this is a permissible use of section 21.

I must declare that this order is not within the powers of the defendants, and that it is ultra vires and void.

Declaration accordingly.

P. P.

The defendants appealed.

On appeal the preliminary point was taken that the defendants' counsel, who on that occasion had been instructed by the Treasury Solicitor, were instructed by a solicitor who had no practising certificate. It was conceded that, in a case in which the Crown had had an interest in the subject-matter being litigated, the Treasury Solicitor might properly have offered his services to a private individual, but it was contended that in the present case the Crown had no interest, because the only subsisting issue, since the expiry of the particular order by effluxion of time, was as to an award of costs.

Leave of the court was obtained by the plaintiffs to raise a point not taken before Vaisey J., namely, that the expression "in any case when the streets are thronged, etc.," should in the context of section 21 of the Act of 1847 be construed as limited to apply only to special or extraordinary events causing traffic dislocation.

Denys Buckley and *John Arnold* for the defendants, Poole Corporation.

G. D. Squibb Q.C. and *Jeremiah Harman* for the plaintiffs, the respondents. The plaintiffs take the preliminary objection that the notice of appeal was taken out by the Treasury Solicitor, a person who has not got a practising certificate in accordance with the provisions of the Solicitors (Amendment) Act, 1956. The defendants have changed their solicitor to the Treasury Solicitor, who is in fact a member of the Bar. It is submitted that he is not entitled to appear for the defendants. The Treasury Solicitor has a limited exemption from the provisions of the Solicitors Acts and may act on behalf of a private individual, but that is only in cases where the Crown or the State has an interest. Where an order is made by a local authority under the Town Police Clauses Act, 1847, the Minister of Transport on behalf of the Crown is not concerned. Even if the Minister could be concerned in a case such as this, he cannot be concerned here, since the only order Vaisey J. made was to direct the defendants to pay the costs. [Reference was made to the Revenue Solicitors Act, 1828, to section 12 of the Attorneys and Solicitors Act, 1874, replaced by section 77 of the Solicitors Act, 1932, now section 87 of the Solicitors Act, 1957.]

The office of Treasury Solicitor was created by the Treasury Solicitor Act, 1876, and he is constituted a corporation sole. In *Rex* v. *Archbishop of Canterbury* [1] the Treasury Solicitor acted for the archbishop and it was held that the Crown had an interest in the archbishop's case. The defendants here are in no different position from that of any private person. If proceedings were taken under the Road Traffic Act, 1930, the Minister would be interested and could appear by the Treasury Solicitor. In the case of orders made under the Town Police Clauses Act, 1847, by a local authority, however, the matter is within the entire competence of the local authority and is one with which the Crown is not concerned. The Treasury Solicitor must show that the Crown has an interest. There is no case in which the extent of the necessary interest of the Crown has been considered. [Reference was made to *Martell* v. *Consett Iron Co. Ltd.*[2]—a case of maintenance.]

Denys Buckley for the defendants. The point at issue may seem to be merely a question of costs, but the real question is: was Vaisey J.'s decision right? A large number of orders have been made under the Act of 1847. It is still a matter of practical interest to know whether this order under the Act of 1847 was valid. The Treasury Solicitor can act in this matter for the defendants because the Minister regards the extent of the powers of a local authority under the Act of 1847 as being of public importance having regard to the public administration and control of traffic. It is for the Crown to decide whether a case is of sufficient public interest for the Treasury Solicitor to be instructed. Before the Crown Proceedings Act, 1947, the Crown could not be made liable in tort, but it was the custom for the Treasury Solicitor to act for an employee of the Crown sued in tort, although nothing could be recovered from the Crown. Whether the Treasury Solicitor should be instructed or not is a matter of public policy. It is an administrative decision. In Robertson's Civil Proceedings by and against the Crown (1908), p. 18, it is said that the Minister's decision is sufficient to authorize the Treasury Solicitor to appear for any person and that the court cannot inquire whether in fact the Crown's interests are concerned or not.

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[1] [1903] 1 K.B. 289; 19 T.L.R. 92.

[2] [1955] Ch. 363; [1954] 3 All E.R. 339.

G. D. Squibb Q.C. in reply on the preliminary objection. It has not been shown that the Minister has a sufficient interest. He may wish to know what the answer is to the question raised; that is an academic interest only. The Minister must show that he has a practical interest in the subject-matter of the case. The Minister in fact has no real business interest in this order.

[LORD EVERSHED M.R. said that the objection had not at that stage been made out and that the appeal should be opened.]

Denys Buckley and *John Arnold* for the defendants. Section 21 is wide enough to justify the order. Under that section a local authority may prescribe the route to be followed by vehicles, including carriages (which by virtue of section 31 of the Road Traffic Act, 1930, covers motor-vehicles) and persons. The "route to be observed" in that context does not necessarily mean a route between two fixed termini, but merely the direction or way to be taken in travelling. That is a natural meaning of the word. In other contexts, such as in *Kelani Valley Motor Transit Co. Ltd.* v. *Colombo-Ratnapura Omnibus Co. Ltd.*,[3] it can mean a way between two fixed termini, as when one speaks of an omnibus route. When used in that sense traffic following the route would have to remain on it for the whole distance, but in the present context the defendants are not concerned with where a vehicle comes from or where it is going. They merely seek to control the course to be followed so long as the vehicle is on a road affected by the order, and it can turn off at any point.

The next question is what is meant by "preventing obstruction" within the section. Anything which tends to lessen obstruction tends to prevent it. A one-way street order reduces obstruction by enabling the traffic to move quickly and more freely. "Obstructions" are not necessarily stationary. The Lord Mayor's Show is an obstruction from the point of view of the movement of traffic, but in fact the procession moves at a leisurely pace all the time. *Dudderidge* v. *Rawlings*[4] was concerned with regulating moving traffic.

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[3] [1946] A.C. 338; 62 T.L.R. 459.

The council can make an order directing the route or an order preventing obstruction. *Teale* v. *Williams*[5] was concerned with preventing obstruction.

In addition to empowering the authorities to make orders for preventing obstruction in the special instances given in the section when traffic congestion can be anticipated and precautions taken in advance, there is power to make orders "in any case when "the streets are thronged [i.e., customarily] or liable to be "obstructed." There is nothing in the context which justifies restricting the meaning of those wide words. If it had been intended to restrict the meaning, the draftsman would have said "in any similar case," but he has not done so.

Under this part of the section the authorities have power to deal with long-term thronging, as distinct from short-term problems caused by particular events. Of course it is not necessary to show that the streets are thronged throughout the day and night to the extent required to justify the order. "Thronged" is archaic, but means crowded either by vehicles or persons.

The powers conferred by section 21 are not duplicated in section 46 of the Act of 1930. The later powers extend to different authorities. Heavier fines can be imposed for contraventions, and it may have been thought that in those circumstances ministerial control was desirable. It has been suggested that the earlier powers may have been cut down by section 46, but a limitation by subsequent legislation can only be by a partial revocation, either express or to be inferred because of inconsistencies between the enactments, or, where there is a code of legislation, by an explanation in a later Act of some obscurity in the earlier one. There is no code of legislation here and nothing expressly or impliedly revoking section 21. It would be surprising to find a repeal by implication in an Act which contains express repeals of other enactments in other sections.

[Counsel was stopped on that point.]

The cases in the Divisional Court (referred to below) were rightly decided and are in point. In any case the court would be slow to come to the conclusion that they were wrongly decided, for they have a bearing on criminal matters and should be overruled only if the court is of opinion that the section is incapable of bearing the construction which has been put on it.

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[4] (1912) 108 L.T. 802.

[5] [1914] 3 K.B. 395

John Arnold following. There may be some overlapping between section 21 of the Act of 1847 and section 46 of the Act of 1930 so far as urban district authorities are concerned; they are the bodies which need the most help with traffic problems and there is nothing remarkable in there being alternative procedures open to them, one of which can be adopted without having to comply with the complex procedure of section 46. If " route " is construed in the narrow sense suggested by the plaintiffs, there is no provision anywhere for dealing with a special occasion which is not foreseeable sufficiently far ahead to put the section 46 procedure into operation.

G. D. Squibb Q.C. and *Jeremiah Harman* for the plaintiffs. Although the Minister is legally interested in traffic problems since the Act of 1930, that Act has not given him any legal interest in orders made under the Act of 1847. He has no powers in relation to that Act or to this particular case. The mere ipse dixit of the Minister that he is interested is insufficient to justify the intervention of the Treasury Solicitor. The point was not taken in *Rex* v. *Archbishop of Canterbury*,[6] and Sir Robert Romer L.J.'s remark [7] must be read in that context. As the order has now expired, the only issue remaining is as to costs, a matter in which the Crown can have no interest. Further, in view of the expiry of the order, the court is being asked to decide a hypothetical question: *Sun Life Assurance Co. of Canada* v. *Jervis*.[8]

[ROMER L.J. But if that is so, it is almost impossible to get the issue as to the extent of the corporation's powers under section 21 decided, for an order would not normally survive long enough to enable the case to reach the Court of Appeal.]

In this case the proceedings were not started promptly and the issue has been put an end to by the parties themselves. [Reference was made to *Landed Estates Co.* v. *Weeding*.[9]]

Section 21 was intended for special occasions or for special places, such as the vicinity of theatres, etc. The general words following the special instances given in the section should be construed as limited to special events. The words from " time " to time shall make orders " suggests something of a temporary or special nature. It was not within the contemplation of the

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[6] [1903] 1 K.B. 289.

[7] Ibid. 295.

[8] [1944] A.C. 111; 60 T.L.R. 315; [1944] 1 All E.R. 469.

[9] [1871] W.N. 148.

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section that orders would be made for long periods. An order directing the route to be observed ought to be directed to keeping traffic away altogether from the streets affected by the event, not to interfering with traffic which is already there. "Route" in this section does not connote direction but has the meaning of "by-pass," or a way between two points. There is no power under this Act to make a one-way street order, nor would one expect it, for the concept of a one-way street seems to be modern. The supplement to the Oxford English Dictionary suggests that it did not come in till the 1920's.

It is not suggested that section 21 has been abrogated by the later Act, but section 46 of the Act of 1930 throws light on the meaning of "route" in section 21 of the Act of 1847, and it is permissible to have regard to a later Act for the purpose of resolving an ambiguity.

It was difficult to contend before Vaisey J. that the section was limited to special occasions, having regard to *Teale* v. *Williams* [10] and the other decisions of the Divisional Court which followed it. The first was *Dudderidge* v. *Rawlings*.[11]

[Lord Evershed M.R. That case is not of any assistance, for the words "in any case where the streets are thronged" were not dealt with.]

In *Teale* v. *Williams* [12] the point was raised and fully argued before the court, but it is submitted that it was wrongly decided. The judgment of Shearman J. is unconvincing, and if "in any "case" means "whenever," then the preceding special instances would appear to be otiose. *Teale* v. *Williams* [12] was followed with hesitation in *Edwards* v. *Wanstall*.[13]

[Lord Evershed M.R. In *Etherington* v. *Carter* [14] Humphreys J. expressed the view that if it were to be shown that an order extended beyond the period in which obstruction had been proved, the order would be bad.]

It is most improbable that the streets could be said to be thronged or obstructed throughout the whole of the period to which this order relates, both day and night.

It is a misuse of the powers of the local authority and, therefore, illegal, to use them for a traffic experiment. [Reference was made to *Stockton and Darlington Railway Co.* v. *Brown*.[15]] The decisions in the Divisional Court that the general words in section 21 of the Act of 1847 should not be limited by the application of the ejusdem generis rule to the genus to be found in the specified instances are not, of course, binding on the Court of Appeal, and though the court would, admittedly, be slow to overrule decisions of an inferior court which have stood for a long time, these cases are not within the stare decisis rule. [Reference was made to Lord Loreburn's speech in *West Ham Union* v. *Edmonton Union*.[16] *Teale* v. *Williams*[17] is distinguishable on the facts; it has never been affirmed by a superior court. No rights have been vested in anyone because of orders made. Even if the cases are now said to be wrong on this point, they will not necessarily have to be overruled, because they can probably be justified under the latter part of the section. [Reference was made to *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*.[18]]

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[10] [1914] 3 K.B. 395.
[11] 108 L.T. 802.
[12] [1914] 3 K.B. 395.
[13] (1929) 142 L.T. 288; 46 T.L.R. 101.
[14] [1937] 2 All E.R. 528, 531.
[15] (1862) 9 H.L.Cas. 246.

It cannot be said that this order was to prevent obstruction. Only stationary objects cause obstruction and the most that this order does is to ameliorate the effects of the obstruction. Avory J. distinguished in *Teale* v. *Williams*[19] between a static hawker and a moving one. Obstruction should be distinguished from congestion.

Jeremiah Harman following. The obstacle to the application of the ejusdem generis rule is *Teale* v. *Williams*.[19] *Dudderidge* v. *Rawlings*[20] is not in point, and the other cases add nothing to *Teale* v. *Williams*,[21] except perhaps *Etherington* v. *Carter*,[22] which is distinguishable from the present case. The Divisional Court was, of course, obliged to follow *Teale* v. *Williams*.[23] [Reference was made to *Younghusband* v. *Luftig*.[24]] The ejusdem generis rule is correctly set out in Maxwell on Interpretation of Statutes, 10th ed. (1953), at p. 337, and applies here. It is significant that the general words following the particular instances do not, as is common in the authorities cited in Maxwell, include "other." As a matter of English, "other" tends against the limitation of the general words, and its absence is, therefore, an indication the other way. The specified instances form a category of intermittent events. That is borne out by the sidenote which, though not of course binding, is sometimes helpful. [Reference was also made to *Tillmanns & Co.* v. *S.S. Knutsford Ltd.*[25] and *Attorney-General* v. *Brown.*[26]]

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[16] [1908] A.C. 1, 4; 24 T.L.R. 108.

[17] [1914] 3 K.B. 395.

[18] [1937] 2 K.B. 445; 53 T.L.R. 609; [1937] 2 All E.R. 298; (affirmed [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79).

[19] [1914] 3 K.B. 395.

[20] 108 L.T. 802.

[21] [1914] 3 K.B. 395.

[22] [1937] 2 All E.R. 528.

[23] [1914] 3 K.B. 395.

[24] [1949] 2 K.B. 354; 65 T.L.R. 397; [1949] 2 All E.R. 72.

[Lord Evershed M.R. If the matter were res integra, I would have no doubt that the ejusdem generis rule applied to the section, but it would be doing the public a disservice if there is then no power for the police to direct and control traffic.]

There is power under section 49 of the Act of 1930 and there is power under section 21 itself to give directions to police constables for keeping order in places of public resort. Those powers, together with the Act of 1956, are, it is submitted, amply sufficient to cover all normal requirements. It is accepted that there is a break in section 21 after the general words here in question so that the second part is not necessarily governed by the first part.

[Lord Evershed M.R. It may, therefore, be possible to save the actual decisions in the Divisional Court cases, that is, if " streets . . . and other places of public resort " covers any place where the public resort in numbers.]

It would certainly save *Etherington* v. *Carter*,[27] for there the order related to the precincts of Windsor Castle, which was undoubtedly a place of public resort. But the present order cannot be justified under that provision, for ordinary streets in an ordinary seaside town are not places of public resort.

The court is entirely free to overrule *Teale* v. *Williams* [28] and justice would be done by doing so. [Reference was made to *Westminster Council* v. *Southern Railway Co.*[29]] This is not comparable to an ancient authority affecting matters of title, as was *In re Forsey and Hollebone's Contract.*[30] Breaches of the order are criminal offences and it is unjust that people should be wrongly convicted, as they must have been and continue to be if the decisions are wrong and are not overruled. In criminal matters the courts should be ready to overrule old cases. [Reference was also made to *Perrin* v. *Morgan.*[31]]

" Route " is a line of travel between two termini and carries no indication of direction. For example, the short sea route can be either from Dover to Calais or the other way round. A mere " route " cannot make a one-way street.

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[25] [1908] 2 K.B. 385; 24 T.L.R. 454; (affirmed [1908] A.C. 406; 24 T.L.R. 786).

[26] [1920] 1 K.B. 773; 36 T.L.R. 165.

[27] [1937] 2 All E.R. 528.

[28] [1914] 3 K.B. 395.

[29] [1936] A.C. 511, 563; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[30] [1927] 2 Ch. 379.

[31] [1943] A.C. 399; [1943] 1 All E.R. 187; 59 T.L.R. 134.

Buckley in reply. Applying the test laid down by Lord Loreburn in *West Ham Union* v. *Edmonton Union*,[32] it cannot be said that the cases in question are "plainly" wrong. Several judges have taken the view that the section should be so construed, including Lord Hewart C.J. in *Etherington* v. *Carter*.[33] In some fields of law a decision may become plainly wrong because of subsequent developments. For example, the law on charities is in a state of flux and principles have been evolved which show that some of the cases ought now to be regarded as wrong. But there is here no subsequent course of judicial decisions disclosing weakness in the reasoning on which the Divisional Court decisions were based. The language of Shearman J. in *Teale* v. *Williams* [34] is, admittedly, very wide, but it must be read in the context. He did not say that the power to make orders extended beyond cases where the streets are likely to be thronged or obstructed. "The widest possible meaning" must be read in the light of the statutory power which he had just read. All that he was saying was that "in any case" was perfectly general and should not be restricted by applying the ejusdem generis rule.

In applying the stare decisis rule the court ought to pay some heed to the general balance of public convenience. There is not only the past to be considered (for many orders have been made in the light of the interpretation put on the section in these decisions), there is also the future. If the power is limited to special events, there is no power to deal quickly with traffic congestion not caused by special events. If the Act is given the narrow construction suggested by the plaintiffs, the police had no power until 1930 to deal with traffic regulation anywhere except in the Metropolis. Section 49 of the Act of 1930 gives certain powers, but even there there is no power to enable the police to deal with, for example, a scaffolding which it might be desirable to remove in order to prevent obstruction.

It is not correct to say that the problem with which the order seeks to deal is not one which was likely to have been within the intendment of the Act of 1847: cf. the Metropolis Police Act, 1839, s. 52. Even in 1847 local authorities had traffic problems. Certainly there was congestion in market towns because of the animals. As Lord Sankey said in *Attorney-General* v. *Brown*,[35] it is relevant to consider the circumstances in which an Act was passed as an aid to construction, and it is submitted that the words used ought to be read in the light of the corresponding Metropolitan Act.

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[32] [1908] A.C. 1, 4.

[33] [1937] 2 All E.R. 528.

[34] [1914] 3 K.B. 395.

[35] [1920] 1 K.B. 773, 791.

The ejusdem generis rule should only be applied to resolve ambiguity. In most of the reported cases the general words which have been restricted by applying the rule included "other" (i.e., in "any other case"), which introduced an element of doubt: *S.S. Knutsford Ltd.* v. *Tillmanns & Co.*[36] and the cases there cited. It is essential to the application of the rule that there should be a category. Here not only do the general words appear in a separate and distinct clause, but it is clear that they are directed to a different problem and do not fit onto the specified instances. The first part of the section empowers the authority to make orders in anticipation of congestion resulting from processions, rejoicings or illuminations. The general words relate to actual thronging or being in a state when obstruction is likely. Under the first part it is not essential to prove that obstruction was likely. An authority can act in the interest of public order. For example, an authority could make an order under the Act designed to prevent two opposed public processions from meeting each other. It is submitted also that having regard to the analogous provision in the Metropolis Police Act, 1839, "public" qualifies only processions and not "rejoicings" or "illumina-" tions," though the occasion would no doubt be one in which the public participated to the extent that it was relevant to traffic problems. The instances given in the first part of the section do not, therefore, constitute a category. There is nothing in the section which indicates that the general words were not intended to have their natural wide meaning. Even if, however, the ejusdem generis rule applies, the holiday season is an event which creates conditions in which the power could properly be exercised.

If the order is otherwise valid, it is not impeachable, because it may not have been essential every moment throughout the period of its operation. It would be impracticable to operate a one-way traffic order during part of a day. In any case, the onus of proving that the order attempted to cover an excessive period was on the person alleging it. The point was not taken before Vaisey J. and ought not to be taken now when there is no evidence before the court on which to consider it.

An order "prescribing the route to be followed" must be construed in a reasonable manner. Cross-cutting would be de minimis. The order applies to any vehicle coming onto the road at any point, that is the terminus ad quem in a sense, and the terminus ad quo is where the vehicle leaves the affected roads. The authority have power under this section to prescribe "routes"; the power is not limited to prescribing a single route.

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[36] [1908] A.C. 406.

Apart from the question of the construction of section 21, the order cannot be bad on the ground that this is an improper exercise of the powers of the local authority unless it be shown that they were not acting bona fide in the exercise of what they believed to be their powers, and that has not been suggested: *Stockton and Darlington Railway Co.* v. *Brown.*[37]

[Counsel was stopped on that point.]

Cur. adv. vult.

December 16. LORD EVERSHED M.R. (judgment read by Romer L.J.). This is an appeal against a judgment of Vaisey J. declaring ultra vires and void an order made by the defendants on March 5, 1957, under powers which they claim to be available to them under section 21 of the Town Police Clauses Act, 1847. Omitting formal parts, the terms of that order, the intended effect of which was to make, for the period of six months specified therein, the thoroughfare described in the order what is commonly called a "one-way street" [were as set out above. His Lordship continued:]

Before Mr. Buckley could begin to open the appeal on the defendants' behalf, Mr. Squibb, for the plaintiffs, took a preliminary objection which, in the form as it was first presented, was that Mr. Buckley's instructions came from a solicitor who had no practising certificate in accordance with the Solicitors (Amendment) Act, 1956. The real substance, however, of the objection was directed to the fact that the Treasury Solicitor (who, being in fact a member of the Bar, is incapable of obtaining a practising certificate) was representing the defendants for the purpose of the appeal. The office of Treasury Solicitor is derived from the Revenue Solicitors Act, 1828. He normally acts for Her Majesty or for Ministers of the Crown or other persons in the service of Her Majesty. But he may also, in certain circumstances, be instructed by or on behalf of the Crown to offer his services to a private individual in the course of litigation and, if his services are accepted, may thenceforward act for such private individual. The circumstances which justify such instructions and such a result are that the Crown has an interest in the subject-matter of the litigation: see the decision of this court in *Rex* v. *Archbishop of Canterbury.*[1]

[37] 9 H.L.Cas. 246.

[1] [1903] 1 K.B. 289; 19 T.L.R. 92.

So far there was no contest between Mr. Squibb and Mr. Buckley. But it was Mr. Squibb's contention that the Crown had in truth no interest whatever in the subject-matter of the present appeal, which was one exclusively between the defendant corporation on the one hand and the plaintiff company, a property owner within the local jurisdiction of the corporation, on the other; and Mr. Squibb sought particular support for his submission from the circumstance that the order of March, 1957, had in any case expired on October 19, 1957, so that (as he claimed) the only live issue between the plaintiffs and defendants was that of the award by Vaisey J. to the plaintiffs of the costs of the action.

After hearing arguments from Mr. Squibb and Mr. Buckley, we intimated that we were not disposed to accept the objection as fatal to the appeal in limine; and we proceeded to hear the substance of the appeal accordingly. In the result, I have for my part been strongly confirmed in the view which I had been earlier disposed to take, videlicet, that the Crown has in the present case an interest in the subject-matter amply sufficient to support and justify its intervention.

In the *Archbishop of Canterbury's* case [1] the question at issue had been whether upon the election of a bishop objections could be put forward on doctrinal grounds after confirmation of the election by the archbishop; and the court had no difficulty in holding that the Crown had a sufficient interest in the matter to justify the Treasury Solicitor's appearance for and representation of the archbishop. No exposition is to be found in the judgments of what constitutes a sufficient "interest" for present purposes. Mr. Buckley submitted that it sufficed if the Crown or some Minister of the Crown or, perhaps, the Treasury Solicitor himself, asserted the existence of an "interest" in the Crown. The argument does not appear to have been advanced by Sir Edward Carson S.-G. in the *Archbishop's* case,[2] and the language, at any rate of Romer L.J., seems clearly to avoid so deciding. He said [3]: "Under those circumstances, the Crown, for what "appear to me good and sufficient reasons, came to the con-"clusion that it was to the interest of the Crown that it should, "at its own expense, defend on behalf of the archbishop. . . . "It appears to me that where the Crown for good and sufficient "reasons thinks it is for its interests that the defence of an "individual, in an action or proceeding against him, should be "undertaken, and the Treasury Solicitor is delegated by the

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[1] [1903] 1 K.B. 289.

[2] Ibid. 291.

[3] Ibid. 294, 295.

"Treasury authorities to act as solicitor for that individual, that "is within the rights of the Crown, and is within the purview "of the ordinary duties of the solicitor."

No doubt in 99 cases out of 100 the view of a Minister of the Crown that the Crown was "interested" in any given subject-matter would at the least strongly support the conclusion that it was; but I should not, as at present advised, be disposed to hold that in such cases the ipse dixit of a Minister or his representative was itself conclusive. In the present case, however, I feel no doubt at all that the Crown has an "interest," according to the ordinary acceptation of that word, in the subject-matter in dispute. Traffic control is notoriously a matter of national concern; and the real question at issue in the action is whether a broad class of local authorities, of which the defendant corporation is one, has, by virtue of the Act of 1847, power, of its own motion, to regulate traffic within the ambit of its jurisdiction by means of orders of the kind so far successfully impugned in this action; or whether such orders can only competently be made under the much more recent road traffic legislation which requires their confirmation by the Minister of Transport. In my judgment, it is impossible sensibly to deny that the Crown, and particularly the Minister of Transport, has an interest in that question. Nor can I accept Mr. Squibb's argument that the expiry of the defendants' order of March according to its terms makes the matter purely academic or that the only "live issue" is one of costs, in which (as such) the Crown could legitimately have no interest at all. The question of the scope and availability to the defendants of section 21 of the Act of 1847 for the purposes of traffic regulation remains, in my view, a "live issue" notwithstanding the expiry of the order of March by effluxion of time. It is not in doubt that the defendant corporation wishes to avail itself of the powers of the Act of 1847 (if they subsist) for the purposes of traffic regulation as occasion may require; and we were informed that the decision of the court below has similarly affected other municipal authorities. Put conversely, it is not suggested that the order of March, 1957, exhausted the intended invocation by the defendants of the powers of the Act of 1847 for regulating the traffic of Banks Road and Panorama Road, let alone other thoroughfares within their jurisdiction: still less that (as in the *Sun Life Assurance Co. of Canada* v. *Jervis* [4]) the result of this appeal could be said to be a matter of indifference to the plaintiffs.

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[4] [1944] A.C. 111; 60 T.L.R. 315; [1944] 1 All E.R. 469.

I turn, therefore, to the substance of the appeal itself; section 21 of the Town Police Clauses Act, 1847 (of the powers conferred by which the defendants' recited order of March, 1957, purported to be an exercise) reads as follows: [His Lordship read the section as set out above and continued:]

It was the contention of Mr. Squibb and Mr. Harman, which they put in the forefront of their case in support of the conclusion of Vaisey J., that the defendants' order, the declared intention and effect of which was to make of Banks Road and Panorama Road (as defined in the order) a "one-way street," was outside the scope of the section since, notwithstanding the express use therein of the five vital words, the order did not amount to an order for "the route to be observed" by vehicles as that phrase in the section ought properly to be interpreted. The argument of Mr. Squibb and Mr. Harman was to the effect that the word "route" in the section was used and used exclusively in the same sense in which it is used in phrases like "a "bus route" or "a tram route" and signified the course or the street or streets used (or to be used) by vehicles in proceeding from one point to another, regardless of direction; that the phrase was not apt to mean or include merely a direction to be followed; and more particularly, that "an order for the route to be "observed" was never intended to mean or cover and should not be taken to mean or cover an order designed to give to a particular street or streets a special quality or characteristic, videlicet, such that any vehicle in the street or streets, whatever might be its point of entry or its destination, must move in the street in one direction only.

In support of the argument it was said, and said with some force, that the idea of "one-way streets" as a means of dealing with day-to-day traffic congestion was something not dreamt of in 1847; and counsel drew attention to the language of section 46 of the Road Traffic Act, 1930, in which a distinction is drawn in the paragraphs of subsection (2) between the specification of routes to be followed by vehicles, on the one hand, and, on the other, the prohibition of the driving of vehicles on a specified road otherwise than in a specified direction. Finally, it was submitted that the inapplicability of the section to a "one-way "street" order is shown by the terms of the present order itself, which, by straining the language of the section to achieve such a purpose, produces the result that, as a strict matter of language, a vehicle cannot turn out of Banks Road or Panorama Road into one or other of the side streets, but must pursue the stipulated direction at least to the south-west junction of the two roads.

But notwithstanding the strong reliance placed by Mr. Squibb and Mr. Harman upon this part of their case (which was indeed made the subject of their notice under Ord. 58, r. 6), I have felt unable to give to the essential words " the route to be observed " so strict and confined a meaning. Though it is no doubt true that the words may have been primarily intended—particularly having regard to their context and to the immediately following words " by *all* carts, carriages, horses, *and persons* "—to provide for such expedients as the temporary closing of certain streets or parts of streets and the total diversion of all traffic, including pedestrian, it does not seem to me that the words according to their ordinary and proper usage can be interpreted so as to exclude the ordering of traffic in a thoroughfare to observe one " direction " or " route " therein only. The word " route " is, after all, defined in the Shorter Oxford English Dictionary as: " A way, road or course; a certain direction taken in travelling " from one place to another. . . ." Moreover, if a total diversion of all traffic from a particular street or part of a street is comprehended, I do not see why, upon the principle that the greater includes the less, there is not also included the diversion of that part only of the traffic that would otherwise go in one direction along it.

The point is, in the end, a short one, and I hope I shall not be thought disrespectful of the plaintiffs' argument if I do not attempt further elaboration. In my judgment the plaintiffs fail upon this point to sustain the judgment under appeal.

But it is by no means the end of the case. The defendants' order which is challenged in these proceedings recites that the streets to which it applies are " during certain seasons of the " year thronged and liable to be obstructed." It then proceeds to make those streets one-way streets for 24 hours of the day during the six months period from April 19, 1957 (which was Good Friday), to October 19. The words of the section which, according to the defendants, were applicable and justified the making of the order, were the words " and in any case when the " streets are thronged or liable to be obstructed." Those words follow immediately the enumeration " in all times of public pro- " cessions, rejoicings or illuminations "; and the question emerged during the argument whether, upon their proper construction in the context in which they appear, the words " in any case," etc., ought not to be confined to special events, that is, occasions strictly similar to public processions, rejoicings and illuminations, or, at most, to short periods of time when the ordinary day-to-day traffic conditions are liable to be dislocated or obstructed by crowds of pedestrians or streams of vehicles; and so ought to be treated as not at any rate apt or intended to cover the ordinary day-to-day traffic conditions in particular streets so as to provide authority for the making of "one-way street orders" (as Mr. Buckley admitted that his clients claimed to be entitled to do) for long or indefinite periods of time in the general interests of local traffic regulation. It became, indeed, plain during the argument that the choice must lie between construing the general words as limited to special or extraordinary occasions of obstruction, whether or not strictly similar to the preceding examples (on the one hand) and (upon the other) giving them inevitably the wide significance claimed by Mr. Buckley. No middle course —for example, such as to authorize the making of orders for experimental periods only—appeared possible; and if the latter view is correct, the result may appear remarkable. Parliament, in enacting the Road Traffic Act, 1930, thought it right, by the terms of section 46 to which I have earlier referred, to require that proposals for making one-way street regulations should be confirmed by the Minister of Transport. Yet, if Mr. Buckley is right, there exists and had always existed a parallel or corresponding statutory power exercisable without any Ministerial control. It was this result which plainly impressed Vaisey J. and constrained him to decide, as he did, against the validity of the order. If upon its true construction section 21 of the Act of 1847 has the wide ambit for which Mr. Buckley contends, then the court must so decide, notwithstanding the strangeness of the result. But the court will not, in my judgment, be astute to pronounce in favour of such a conclusion, and certainly not the less so since modern traffic conditions calling for one-way street regulation could not have been in the contemplation of the legislation of 1847. The motor traffic to be found in Banks Road and Panorama Road, Poole, in "certain seasons of the year," could not have been within the mischief which the Act of 1847 was designed to remedy.

The plaintiffs do not appear in the court below to have argued for a limitation of the general words to particular or extraordinary occasions; nor had they raised the point in their notice under Ord. 58, r. 6. They no doubt rightly felt that the point was concluded against them before Vaisey J. by certain decisions of the Divisional Court later mentioned. Mr. Squibb told us that in this court also he had felt those cases to be a serious obstacle, since the earliest of them had been decided over 40 years ago; and he had also felt somewhat constrained by the fact that the same general words appeared in the Metropolitan Police Act, 1839 (as well as in some private Acts), in a context which made the argument for limitation of their effect more difficult. But after discussion before us, Mr. Squibb asked for leave to amend his notice so as specifically to raise the point; and since Mr. Buckley did not oppose we gave leave accordingly.

I propose to express my view upon the point in the first instance treating it as res integra and without regard to the Divisional Court decisions: and so treating it, I have come to the conclusion that in the context in which they appear the words "in any case" ought to be treated as intended only to cover "cases" of the same class or "genus" as the three preceding instances, that is, either "cases" strictly similar to "public processions, rejoicings or illuminations"; or, alternatively, "cases" of obstruction or dislocation of a special or particular and extraordinary kind; and ought not, therefore, to be treated as covering the circumstances of ordinary day-to-day traffic conditions.

The books provide numerous examples of the application of the so-called "ejusdem generis" rule of construction. I take for a statement of the appropriate principle the following passages from the judgment of Farwell L.J. in *Tillmanns & Co.* v. *S.S. Knutsford Ltd.*,[5] in which this court held the rule to apply so as to limit the phrase "in consequence of war, disturbance, or any other "cause" to causes of the same kind as the two named instances. The Lord Justice, after observing that there is no room for the application of the rule unless there is in truth a class or category, proceeded [6]: "But when there is a clear category followed by "words which are not clear, unambiguous general words, it "would violate a settled rule of construction to strike out and "render unmeaning two words which were presumably inserted "for the purpose of having some meaning." And again [7]: "Now, if the words in this case had been 'in consequence of "'war, disturbance, or any cause whatsoever, whether similar "'to those preceding or not,' there would have been no room "for argument, because there would be no real category at all: "it is universality, and not a category; it is the whole range of

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[5] [1908] 2 K.B. 385; 24 T.L.R. 454; (affirmed [1908] A.C. 406; 24 T.L.R. 786).

[6] [1908] 2 K.B. 385, 403.

[7] Ibid. 404.

"causes. But, inasmuch as you have simply the words 'any "'other cause,' which are ambiguous, then the rule does apply. "The rule may be taken as stated by Lord Tenterden C.J. in "*Sandiman* v. *Breach*[8]: 'Where general words follow particular "'ones, the rule is to construe them as applicable to persons "'ejusdem generis.' The same rule was applied in *Reg.* v. "*Cleworth*,[9] which turned on the construction of a statute "enacting that no tradesman, artificer, workman, labourer, or "other person whatsoever should do or exercise any worldly "labour, etc., on the Lord's Day. Cockburn C.J. said[10]: "'Then there is a general expression "other person whatso- "'"ever"; but, according to a well-established rule in the "'construction of statutes, general terms following particular "'ones apply only to such persons or things as are ejusdem "'generis with those comprehended in the language of the "'Legislature.' Crompton J. and Blackburn J. both agreed. If, "therefore, there is a category, then the rules, which have come "down to us from former generations and which still remain in "full force, will apply."

The impression which the language of the present section clearly forms upon my mind is that, within the principle above stated, the general words "in any case . . ." were intended to be confined and should be confined to cases within the "genus" or category of which public processions, rejoicings and illuminations are specific instances. The three instances suffice, in my judgment, to constitute a genus which, even if not confined to instances strictly similar to those three, may be stated as special occasions (not necessarily limited to a single day) when the ordinary day-to-day use of streets or highways is, or is liable to be, obstructed or dislocated by substantial numbers of persons, on foot or in vehicles, participating as spectators or otherwise in the occasion. It is quite true that the word "other" does not occur before the word "case" as, in the authorities, it commonly does in the general words following the particular instances. But I cannot find that the presence of that word has been regarded as essential to the application of the rule as it is, in my judgment, irrelevant to its principle. No reliance is put upon the presence of the word in the *Tillmanns* case[11] or in the older authorities therein cited: and see *Rex* v. *Wallis*,[12] referred to by Romer L.J. in the judgment which he is about to deliver and which I have had the advantage of seeing. As a matter of English, it may indeed be said that the word " other " would tend rather against the limitation of the general words. Nevertheless, Mr. Buckley put the absence of the word " other " in the forefront of his argument. He might even, as I understood him, have been disposed to concede, had the phrase been " and in any *other* " case . . ." that the general words so introduced should be limited to instances ejusdem generis as public processions, etc. But he argued that the relevant part of the section should be treated as applicable to two distinct sets of circumstances, videlicet: (1) public processions, rejoicings or illuminations (of which throngs and obstructions were not essentially characteristic) and (2) " any case " in which streets were thronged or liable to be obstructed.

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[8] (1827) 7 B. & C. 96, 100.

[9] (1864) 4 B. & S. 927.

[10] Ibid. 932.

[11] [1908] 2 K.B. 385.

[12] (1793) 5 Term Rep. 375.

But it is, in my judgment, impossible to accept the view that Parliament were legislating in regard to " times of public processions, rejoicings or illuminations " as a distinct and confined class of occasion with which throngs and street obstructions were not necessarily involved. The power conferred is one for ordering " the route to be observed . . . *and for preventing obstruction of the streets.*" It seems to me, therefore, impossible to treat the three specified examples of public processions, etc. (and, if necessary, I would treat the word " public " as applicable to all three), otherwise than as instances when the streets are thronged and liable to be obstructed. If this is right, then in my judgment it is impossible to give the general words which follow any sense different from that which they would bear if the word " other " appeared before the word " case." But even if there be two distinct classes of occasion or event (as Mr. Buckley contended) so that the class introduced by the words " in any " case " were not to be interpreted as ejusdem generis with the three events " public processions, rejoicings and illuminations," still, the use of the word " case " seems to me naturally apt and only in the context apt to refer to particular or special occasions or events, and not (as would have been, for example, such a word as " circumstances ") to mean the ordinarily recurring or day-to-day conditions of particular thoroughfares. If, indeed, the latter had been intended, nothing would have been easier than for Parliament to have said so, or at any rate to have used a simpler and wider phrase such as " and whenever." In the end, the question may resolve itself into no more than that of determining, on the true construction of the section, what are the limits (if any) of the " category " introduced by the words "in any case": and in my judgment the category is a limited one which, upon any view of it, excludes the circumstances of the six months period of April to October.

I, therefore, if I am free to do so in light of the decided cases, would hold that the general words must be limited so as to be applicable to instances only of particular and extraordinary occasions, a view which appears to me to be in better conformity with the general tenor or purpose of the section, having regard particularly to the traffic conditions of 1847.

I have expressed my view so far upon this matter upon the assumption that the question is novel. The assumption is, however, not correct, having regard to the Divisional Court decisions earlier mentioned. Our attention was directed to five such decisions. The first is that of *Dudderidge* v. *Rawlings*,[13] decided in December, 1912, before Ridley, Coleridge and Bankes JJ. The case was one in which the Corporation of Bristol had made an order under section 21 of the Act of 1847, which, after reciting that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered the constables to control traffic at cross-roads in those streets by what we now know as ordinary point-duty directions. The appellant was a taxicab driver who declined to obey the signals of a constable operating under the order and had been fined accordingly as for an offence within the terms of the section. The case in the Divisional Court turned upon the narrow point (decided adversely to the appellant) whether disobedience to the constable amounted in truth to a breach of the corporation's order or only to disregard of the constable's signal, which would not itself be an offence under the section. The question of the scope and meaning of the words "in any case," etc., with which we are concerned, does not appear at all to have been raised or debated.

But the matter is otherwise with the second case, that of *Teale* v. *Williams*,[14] decided in April, 1914. There the Corporation of Eastbourne had made an order under the section which, after reciting like the Bristol order that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered (among other things) that no hawker should use the said streets during such hours for the sale of specified goods from trucks or barrows; and gave directions to the police to enforce such order. Upon a prosecution of the respondent, a hawker, for breach of the order, the local justices had held that the section, upon its true construction, only authorized an order to deal with extraordinary occasions of obstruction. Upon appeal to the Divisional Court this decision was reversed. It appears from the leading judgment of Avory J. that some part of the argument had turned upon the submission that the hawker was doing no more than using the King's highway in the ordinary course. It is, however, clear that the point now before us was argued and expressly decided in a sense contrary to that which has commended itself to me. "The question," said Avory J.,[15] "is whether the words 'in any case' mean that they may make "such an order applicable to any street which is usually thronged "or usually liable to be obstructed. In my opinion that is the "plain meaning of the words, and they are not intended to be "limited to cases of extraordinary occasions of obstruction "similar to those of public processions, rejoicings or illumina-"tions." It is, however, no less clear that Rowlatt J. did not himself share this view, though he did not in the end dissent. "However," said he,[16] "the words are wide, and as my "brethren do not feel the difficulty which I feel, I do not desire "to dissent, especially as their construction is from the public "point of view much the more beneficial." Shearman J., on the other hand, went even further than Avory J.; and since his judgment was quoted in full and approved expressly by Lord Hewart C.J. in the fourth of the cases, I venture to set it out here at length [17]: "I am of the same opinion. The only question "left to the court in this case is whether the words of section 21 "authorize the making of a general order for the regulation of "traffic in any street where the ordinary traffic of such street "makes such a regulation necessary in the opinion of the local "authority. In my judgment the words are amply wide enough "to confer such a power. The section begins with a general "reference to the regulation of traffic—'The commissioners may "'from time to time make orders for the route to be observed by "'all carts, carriages, horses, and persons, and for preventing "'obstruction.' Those are the opening words. Then it goes on "to give two or three particular occasions—'in all times of "'public processions, rejoicings, or illuminations.' Having given "those three special occasions it then uses the widest possible "words 'and in any case when the streets are thronged or liable "'to be obstructed.' I cannot entertain much doubt that 'in

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[13] (1912) 108 L.T. 802.

[14] [1914] 3 K.B. 395.

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[15] [1914] 3 K.B. 395, 398.

[16] Ibid.

[17] [1914] 3 K.B. 395, 398.

" 'any case' means in any case and not in a few special cases. "It appears to me that although the statute is not very aptly "worded the intention is merely to give a few examples and then "to confer the widest possible power to be exercised by the local "authority."

The next case, *Edwards* v. *Wanstall*,[18] came before Lord Hewart C.J., Swift and Branson JJ., in the year 1929. The facts of the case were for practical purposes identical with those in *Teale* v. *Williams*,[19] and that fact, together with the further fact that 15½ years had passed since *Teale* v. *Williams* [19] had been decided, are matters to which I shall attach some importance later in this judgment. In *Edwards* v. *Wanstall* [20] the local justices of Herne Bay appear to have taken the point (which had not been raised in *Teale* v. *Williams* [21]) that an order for an indefinite period, even though otherwise within the scope of section 21 of the Act of 1847, was in truth a by-law which required confirmation under the Public Health Act, 1875; and that since the order in question had not been so confirmed it was invalid. The Divisional Court took the view that the case was directly covered by *Teale* v. *Williams* [21] and allowed the appeal accordingly. Lord Hewart C.J., in following *Teale* v. *Williams*,[21] is not reported as having expressed any view of his own; and Branson J. confined himself to concurrence with his brethren. Swift J., however, though also of opinion that *Teale* v. *Williams* [21] was binding, expressed for himself [22] "a good deal of sympathy "with the doubts which were expressed by Rowlatt J." in the earlier case. Swift J. found difficulty in persuading himself that it was in truth intended that the section in question should extend to the making of "a permanent order closing a number "of streets to particular classes of persons for every day of the "week."

The fourth case is *Etherington* v. *Carter*,[23] before Lord Hewart C.J., Humphreys and Singleton JJ. This case also, like the two preceding ones, concerned the making of an order under the section for the prohibition of sales by hawkers in certain streets. In this case the streets were in the immediate neighbourhood of Windsor Castle, and the order made differed from the orders in the two preceding cases in that its operation was not limited to specified hours during the day. The report of the case is in some respects defective, but there can be no doubt that on this occasion Lord Hewart C.J. did express his own personal opinion, which was in strong support of the earlier decisions. Indeed, he went so far as to cite at length the judgment of Shearman J. in *Teale* v. *Williams*,[24] and to express his own entire agreement with that judgment. As regards the absence of any limit as to hours, the Lord Chief Justice thought the point immaterial, since it would have no practical significance during the hours when the hawker would, in the ordinary course, be plying his trade. On the other hand, it may be added that Humphreys J. expressly reserved his view as to the validity of an order made without limitation as to times or hours in a case in which the evidence showed the obstruction to occur or to be likely to occur only during certain periods.

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[18] (1929) 142 L.T. 288; 46 T.L.R. 101.

[19] [1914] 3 K.B. 395.

[20] 142 L.T. 288.

[21] [1914] 3 K.B. 395.

[22] 142 L.T. 288, 290.

[23] [1937] 2 All E.R. 528.

The last of the five cases is *Waring* v. *Wheatley*,[25] which came in 1951 before Lord Goddard C.J. and Slade and Devlin JJ. I need not, however, take time upon this case, for it turned solely upon the circumstance that the information had omitted the word "wilfully," and therefore did not disclose the offence named in section 21 of the Act of 1847. Though other points were taken in the argument, the judgment of the Lord Chief Justice (with which his two brethren agreed) is limited to the single one of the absence of the word "wilfully."

From these cases it is, to my mind, clear that *Teale* v. *Williams*[26] involved the rejection of any limitation in scope of the general words "in any case . . ." to specific occasions, and that that decision has since been followed and treated as binding by the Divisional Court in the few later cases in which the point has been raised.

The cases are not, of course, binding upon this court. But there is well-established authority for the view that a decision of long-standing on the basis of which many persons will in the course of time have arranged their affairs should not lightly be disturbed by a superior court not strictly bound itself by the decision. The matter was recently considered exhaustively in *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*.[27] In that case the members of this court, having concluded that a decision upon a question of rating pronounced some 40 years previously by a Divisional

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[24] [1914] 3 K.B. 395.

[25] [1951] W.N. 569.

[26] [1914] 3 K.B. 395.

[27] [1937] 2 K.B. 445; 53 T.L.R. 609; [1937] 2 All E.R. 298; (affirmed [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79).

Court was plainly wrong, overruled it accordingly: though the earlier decision had without doubt been frequently acted upon in rating matters in the meantime, and though no judicial doubt had previously been cast upon its correctness. Greer L.J. cited [28] in his judgment the well-known passage from the speech of Lord Loreburn in *West Ham Union* v. *Edmonton Union* [29]: " 'Great importance is to be attached to old authorities, on the " 'strength of which many transactions may have been adjusted " 'and rights determined. But where they are plainly wrong, " 'and especially where the subsequent course of judicial decisions " 'has disclosed weakness in the reasoning on which they were " 'based, and practical injustice in the consequences that must " 'flow from them, I consider it is the duty of this House to " 'overrule them, if it has not lost the right to do so by itself " 'expressly affirming them.' " But Greer L.J. was not deterred from overruling the earlier Divisional Court case by reason of the absence of any " disclosure of weakness in the reasoning " of the Divisional Court decision in later judgments. Nor do I think that Lord Loreburn's language should be treated, or has in practice been treated, as laying it down that the power to overrule should never be exercised unless all the circumstances referred to by Lord Loreburn are present and their conditions satisfied.

In my judgment, and with all respect to the contrary opinions expressed in the cited cases, I think that in so far as those cases depended upon a conclusion that the words " in any " case," etc., are unlimited by the context in which they appear, they cannot be supported. Having given the matter my best consideration, I feel it my duty to state my own opinion that Shearman J.'s conclusion, adopted by Lord Hewart C.J., that the words quoted were used in the widest possible sense so as to authorize the making of general orders for traffic regulation wherever the ordinary traffic in a street makes such regulation necessary in the opinion of the local authority, is clearly wrong: and I am comforted and confirmed in this opinion by the similar view which clearly appealed to Rowlatt and Swift JJ.

But though I am unable to agree that the words " in any " case," etc., were intended or are apt to confer the widest possible powers upon the local authority, I must not be taken to be saying that the decisions in the cited cases cannot properly be otherwise supported. It was conceded both by Mr. Squibb and by Mr. Buckley that the powers contained in the latter part of the section are not necessarily limited by the language in the earlier part—in other words, that the local authority may by the section be empowered (in addition to the authority conferred by the earlier part of the section) to give directions to the local constables for keeping order and preventing obstruction of streets which would comprehend the subject-matters of the Divisional Court cases. The words "other places of public resort" are exceedingly wide, and plainly cannot, in my judgment, be confined to places of the same kind as "theatres," a word which, of itself, cannot form a category. It seems to me, therefore, that the decision in the fourth of the cited cases, namely, *Etherington* v. *Carter*,[30] could well have been supported in reliance upon this part of the section since, as was observed in the judgment of Lord Hewart C.J., the environs of Windsor Castle are places to which very large numbers of the public from distances far and near are apt to resort. The full circumstances relating to the relevant streets in Eastbourne and Herne Bay are not fully stated in *Teale* v. *Williams*[31] and *Edwards* v. *Wanstall*,[32] but it may well be that these decisions could be similarly supported on their facts under the second half of the section.

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[28] [1937] 2 K.B. 445, 462.

[29] [1908] A.C. 1, 4; 24 T.L.R. 108.

I have referred already to the fact that the second of the cases last mentioned, *Edwards* v. *Wanstall*,[32] of which the facts were almost identical with those in *Teale* v. *Williams*,[33] came before the Divisional Court 15½ years after the earlier case; from which it may not unreasonably be inferred that no great number of other similar orders had in the meantime been made. Further, since the year 1930 and the coming into operation of the Road Traffic Act of that year, the requisite police powers would appear to be covered by section 49 of that Act—if and to the extent that they cannot be supported (as I have suggested) by the terms of the second part of section 21 of the Act under consideration.

In the circumstances, I am not satisfied that either injustice or inconvenience would be caused by giving effect now to the conclusion which I have formed upon the words "and in any "case," etc., in section 21 of the Act of 1847. Mr. Buckley was not (and could not in the nature of things have been) fully instructed as to the extent to which the section had been invoked by other local authorities for the making of orders comparable to that in the present case. But I am not satisfied that the section has or can have been relied upon to any substantial extent for the

[30] [1937] 2 All E.R. 528.

[31] [1914] 3 K.B. 395.

[32] 142 L.T. 288.

[33] [1914] 3 K.B. 395.

making of "one-way street" orders for indefinite periods of time. The traffic conditions which today require or justify such measures of traffic regulation are recent phenomena. In making provision expressly directed to such a form of traffic regulation, Parliament in 1930 thought it right to require the safeguard of confirmation by the Minister. The court ought not, in my judgment, to arrive readily at a conclusion in conflict with this declared parliamentary intention, and certainly should not be inclined to regard the opposite view as unjust. Having regard particularly, therefore, to the views of Rowlatt and Swift JJ., and also to the fact that (1) the decision in *Teale* v. *Williams*,[34] so far as it rested on the Act of 1847, substantially lost its significance 16 years later with the passing of the Act of 1930, (2) that the decision cannot be regarded as one which has stood "for a long period of time" as that phrase was used, for example, by Lord Buckmaster in *Bourne* v. *Keane*,[35] (3) that the decision itself and those which followed it may be capable of being supported on other grounds, and (4) that the validity of the application of the section in the Act of 1847 to circumstances such as those in the present case has never in fact been previously considered by any court, I think that the Divisional Court decisions ought to be disapproved in so far as they rested upon the unlimited construction of the words "and in any case," etc.

The point was also suggested in argument by the plaintiffs that the defendants' order of March, 1957, fell outside the authority of section 21 on the ground that, after reciting the thronging and liability to obstruction of the relevant streets "during certain seasons of the year," it proceeded to apply the "one-way" traffic regulation for the period from April 19 to October 19, a period which was not shown to correspond with any of the "seasons of the year" previously mentioned; and also on the further ground that in any case the thronging or obstruction sought to be prevented was not shown to have occurred or to be apprehended for 24 hours of all the days and nights of the period of operation of the order. To this point, if open to the plaintiffs, the observations of Humphreys J. in *Etherington* v. *Carter*[36] are relevant. But Mr. Buckley took the objection that the point had not been taken before Vaisey J. and was not raised in the plaintiffs' notice under Ord. 58, and that (if it had been so taken or raised) evidence could have been directed to it. In the circumstances, I do not propose to say anything more upon the point. For the reasons which I have endeavoured to state, I think that this appeal should be dismissed.

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[34] [1914] 3 K.B. 395.

[35] [1919] A.C. 815, 874; 35 T.L.R. 560.

[36] [1937] 2 All E.R. 528.

Romer L.J. I agree. As this appeal proceeded on its course it became quite apparent that Mr. Squibb's preliminary objection to Mr. Buckley's appearance on behalf of the corporation on the instructions of the Treasury Solicitor was altogether untenable. I am not prepared to hold, as Mr. Buckley at one stage of his argument invited us to do, that the mere ipse dixit of a Minister of the Crown that he or his department has an interest in legal proceedings to which neither he nor the Crown is a party precludes the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor. There is a passage in the judgment of Sir Richard Henn Collins M.R. in *Rex* v. *Archbishop of Canterbury* [37] which lends some support to that view, but as Sir Edward Carson S.-G. had not relied on the point in argument there is no reason to suppose that the Master of the Rolls was intending to decide it; and as a mere obiter dictum it was at variance with the observations of Romer L.J. in the course of his judgment in that case. Nevertheless it is quite clear, in my opinion, that it is a matter of real concern to the Minister of Transport, and therefore to the Crown, if a question arises, as it does in the present case, as to the comparative powers of traffic control conferred by the Town Police Clauses Act, 1847, and the Road Traffic Act, 1930, respectively. Nor can I accept Mr. Squibb's contention that as the corporation's order, which is challenged in these proceedings, expired some time since, the only issue remaining is as to the costs of the hearing below, in which admittedly the Crown is in no way interested. The decision of Vaisey J. was that the order was ultra vires and void and he made a declaration to that effect; and the practical result of that decision, so long as it stands, is that the defendant corporation cannot make a similar order in the future. To say that they could do so in theory is to take an unrealistic view of the matter. The defendants want to know, for their future guidance, whether the judge was right or wrong in saying that they acted beyond their powers in making the order, and in my judgment they are entitled to come to this court for the purpose of finding out.

On the main issue the judge based his decision in favour of the plaintiffs on the view that, although section 21 of the Town

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[37] [1903] 1 K.B. 289, 293.

Police Clauses Act, 1847, was not repealed by the Road Traffic Act, 1930, it was not open to the defendants to use the powers conferred by section 21, without any local inquiry or restriction, in an experimental way pending an order being made by the Minister under section 46 of the Act of 1930. At the hearing before this court, Mr. Squibb and Mr. Harman, whilst, of course, relying upon and supporting the basis of the judge's decision, put their case in the first instance in a somewhat different way. The defendants' order of March 5, 1957, has been stated by the Master of the Rolls and I will not repeat its terms; but the first point taken by the plaintiffs is that it was not an order " for the " route to be observed " by the traffic which was affected by it, and was therefore not such an order as is authorized by section 21 of the Act of 1847. " Route," they say, is a line between two termini; it may be a roadway or a sea way (Mr. Harman mentioned the short sea route by way of illustration) or an air way, but, whichever it is, it possesses the characteristics of linking two termini and being available to traffic proceeding in either direction. The plaintiffs say that neither of these characteristics is to be found in the route which the corporation purported to prescribe by their order and which is nothing more nor less than a one-way circuit. In my judgment, this is too narrow a construction of the relevant language of section 21. The plaintiffs' contemplation of a " route " within this language would be something in the nature of a by-pass. I quite agree that it would include a by-pass, but I am unable to see why it should be limited to a by-pass or any other way in which traffic is permitted to move in both directions. Many by-passes have dual carriageways and I should have thought that each carriageway could fairly be described as a route to be observed by the traffic which wished to travel in the permitted direction. Section 21 is dealing with traffic obstruction and with means of preventing it; and in that context the words " route to be observed " postulate the diversion of traffic along a way or ways to be prescribed and the direction which the traffic is to take. So, in the order under consideration, the route to be observed by all traffic (for example, traffic from Bournemouth) wishing to get from the north-east junction of Banks Road and Panorama Road to the south-west junction is by way of Banks Road, and the route for all traffic wishing to get from the south-west junction to the north-east junction is by way of Panorama Road. The fact that these two routes, when taken together, constitute a one-way circuit and that all traffic entering the circuit by a side road must turn right or left as the case may be does not appear to me to be relevant. The truth of the matter is that unless the word "route" in the section excludes the idea of one-way traffic the plaintiffs' contention on this point cannot, as it seems to me, succeed; and in my judgment there is no sufficient ground for such exclusion.

The next question which I propose to consider is whether the words "and in any case" in section 21, following as they do upon a reference to "all times of public processions, rejoicings "or illuminations," are to be limited in some, and if so what, way or whether they should receive a general and uncontrolled construction. If the words had been "in any *other* case" it could scarcely be contended, I should have thought, that such a construction should be attributed to them, for the resulting universality would render wholly otiose the reference to public processions, etc.; and, indeed, it was largely upon the omission of the word "other" that Mr. Buckley founded his argument in favour of an unlimited construction. To justify, said Mr. Buckley, the cutting down of the normal meaning of words it is necessary to find some ambiguity in the language. Such an ambiguity arises, or may arise, from the word "other" when following upon specific examples of a genus, and in such instances the ejusdem generis principle will usually be applied, for otherwise the specific examples would be redundant. But, said Mr. Buckley, the word "other" does not appear in section 21; and this, said he, is not surprising, for "public processions, rejoicings "or illuminations" do not constitute a genus at all.

It is quite true that in most of the cases in which the ejusdem generis principle has been applied to statutory language the stated examples of a genus have been followed by the word "other." There are, however, cases to be found in the books where the principle has been applied notwithstanding the absence of the word "other"—see, for example, *Rex* v. *Wallis*,[38] where the Court of King's Bench applied it to the words "cities, towns "corporate, boroughs and places" in section 1 of the Statute 9 Anne, c. 20, in relation to persons intruding into public offices. In the course of his judgment in that case, Lord Kenyon C.J. said[39]: ". . . the word 'places' in the Act only extends to "offices in places of the same kind with those before enumerated; "otherwise the legislature would have used only one compen-"dious word, which would have included places of every "denomination. In one of the cases cited[40] Foster J. observed

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[38] 5 Term Rep. 375.

[39] Ibid. 379.

[40] *Rex* v. *Williams* (1757) 1 Burr. 402, 409.

"that the Statute of Anne was drawn by J. Powell J.; and that "accurate judge would not have introduced all these different "words, if the last alone would have been sufficient." The other members of the court took a similar view.

The doctrine of ejusdem generis is only a part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine, it is difficult to see what difference it can make whether the word "other" is or is not used, provided—and this is essential—that the examples which have been given are referable to a clearly ascertainable genus. It is, accordingly, vital to ascertain whether the three examples which precede the words "and in any case" in section 21 all possess a common characteristic or quality. In my opinion, and having regard to the context in which they appear, they plainly do. Whether or not the word "public" in the section governs not only "pro-"cessions" but "rejoicings" and "illuminations" as well, so that all three activities were envisaged as possessing a public element, it is not necessary to decide, though I think on the whole that it does. The object of section 21, as is stated by the introductory words of the section, is to confer "power to make "orders for preventing obstructions in the streets during public "processions, etc."; not generally, it is to be observed, but on particular occasions. The body of the section enumerates three such particular occasions and it is quite manifest that each of them is calculated to attract a crowd of persons who collect together; and a crowd of persons who collect together is, in turn, calculated to obstruct the streets in which it gathers. From this I deduce that the element which is common to all of the three instances enumerated in the section is that they only happen from time to time, but when they do occur they are likely to attract a crowd of people whose presence will inevitably, in a great or lesser degree, obstruct the streets. I must confess that I entertain no doubt, having heard elaborate argument upon the point, that the words "and in any case" are limited to events which possess the common characteristics to which I have referred; that is to say, they are limited to special occasions which, by their nature, are likely to attract a crowd. They may be short (for example, a public oration) or they may be comparatively long (for example, coronation celebrations); but they must be occasions of a special kind as distinct from the everyday life of a town. The contrary argument which Mr. Buckley submitted to us substitutes (in effect) "whenever" for the words "in any "case when" and deprives the words "in all times of public "processions, rejoicings or illuminations" of any effect at all; and I must reject a contention which involves these results. Further than this, it appears to me that if the argument is sound there was very little object in empowering the commissioners (as the section does) to "give directions to the constables for . . . "preventing any obstruction of the streets in the neighbourhood "of theatres and other places of public resort"; for, on the corporation's contention, *all* streets (including these streets) where obstruction is ordinarily to be expected could be made the subject of an order under the earlier part of the section.

Thinking, as I clearly do, that the words "and in any case" should receive the limited interpretation which I have stated, the next question is whether effect can properly be given to this view having regard to the earlier decisions of the Divisional Court in which a contrary opinion was expressed. These authorities have been fully reviewed in the judgment of the Master of the Rolls, and I will not refer to them in any detail again. It cannot, of course, be disputed that in *Teale* v. *Williams*[41] the court declined to apply the ejusdem generis principle to the words now under consideration, or that this decision was followed in *Edwards* v. *Wanstall*[42] and in *Etherington* v. *Carter*.[43] These decisions are not binding upon this court, but they are naturally entitled to the weight and respect which all decisions of the Divisional Court receive; and this court would normally be extremely hesitant to overrule them. I am, however, impressed by four considerations which in their totality are sufficient, in my judgment, to remove this case from the principle stare decisis. (1) Rowlatt J. in *Teale* v. *Williams*,[44] and Swift J. in *Edwards* v. *Wanstall*,[45] expressed themselves in terms which, as it seems to me, show that those cases would have been decided differently had those two judges been left to arrive at their own unaided conclusions. (2) Breaches of section 21 are visited with penal consequences. In my judgment, it is not right that persons should suffer such consequences for failing to observe orders which a local authority has no power to make; and if this court is of opinion that the powers conferred by section 21 of the Act of 1847 are in fact narrower than they have hitherto been held to be it is its bounden duty to say so. (3) The overruling of the previous decisions will in no way affect property rights or disturb titles. (4) The powers of making orders such as that now in dispute have been for many years and still are exercisable by local authorities by virtue of section 46 of the Road Traffic Act, 1930, subject only to ministerial approval. These considerations, when taken together, fully justify this court, in my judgment, in substituting its own view of the meaning of section 21 for that which commended itself to the majority, but not all, of the judges who decided the earlier cases. The stare decisis principle was much debated in the well-known case of *Bourne* v. *Keane*,[46] but I can find nothing in the speeches of any of their Lordships in that case, or in any other decision bearing upon this subject which, in view of the considerations which I have mentioned, render it either undesirable or improper for this court to give effect to its own conclusions.

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[41] [1914] 3 K.B. 395.
[42] 142 L.T. 288.
[43] [1937] 2 All E.R. 528.
[44] [1914] 3 K.B. 395.
[45] 142 L.T. 288.

On the footing, then, that (contrary to his contention) the ejusdem generis principle should be applied, Mr. Buckley next submitted that the six months' holiday season at Poole can fairly be regarded as an "event" comparable to public processions, rejoicings and illuminations. He said, quite rightly, that an event need not be limited in duration to one day but may well extend over several days, and he suggested that the summer season at a popular seaside resort may properly be regarded as a special event or occasion equally with a prolonged public holiday or a visit by units of the Home Fleet. In my opinion it would not be right to accept this contention. There is nothing special about the summer season except that it is the time when most people take their holiday, and I cannot agree that that constitutes a special event for any relevant purpose. It is a question of degree whether an occasion is so much outside the general run of affairs in the life of a seaside resort as to be regarded as beyond the ordinary; and I cannot think that the summer holiday period, recurring year after year and lasting from April to October, can reasonably be so regarded.

On the views above expressed, the appeal fails, and it is unnecessary to consider whether it fails also on the ground that the order which the defendants made was ultra vires as being of a merely experimental nature. I feel considerable sympathy with the judge's conclusions on this point, to which he was led by the comparative provisions of section 21 of the Act of 1847 and section 46 of the Road Traffic Act, 1930, respectively. However, it is the fact that whilst certain of the provisions of the

[46] [1919] A.C. 815.

earlier Act were repealed by the later one, section 21 was left undisturbed; and it is therefore a little difficult, perhaps, to say that the defendants could be acting ultra vires if they exercised statutory powers which remained vested in them under and by virtue of section 21. It is not necessary, however, to express any concluded opinion upon this matter because the appeal, in my judgment, fails for the other reasons which I have already indicated.

ORMEROD L.J. I agree that this appeal should be dismissed. I have had the opportunity of reading the judgments delivered by the Master of the Rolls and Romer L.J., and am in full agreement with the reasons given by them for dismissing Mr. Squibb's preliminary objection. Nor do I wish to add anything to what has been said on the question whether an order made in pursuance of section 21 of the Town Police Clauses Act, 1847, prescribing the direction in which traffic shall move in certain streets, is within the power given to the authorities to make orders "for the route to be observed by all carts," etc. In my judgment, on the plain meaning of the words, the powers given by the section are amply wide enough to include such an order.

The important question in this appeal, as I see it, is whether, on the proper construction of the section, the words "and in any "case when the streets are thronged," etc., should bear an unrestricted meaning, or whether by reason of the ejusdem generis rule their meaning should be restricted by the preceding words "in all times of public processions, rejoicings or illumina-"tions." This question was the subject of judicial consideration as long ago as 1914, when in *Teale* v. *Williams*[47] it was decided by the Divisional Court that an order prohibiting hawkers from using certain streets during certain hours for the sale of certain specified goods from trucks or barrows was within the powers given by the section. The order made no reference to any special occasion, but merely recited that certain streets were thronged and liable to be obstructed on weekdays. Avory J. expressed the view that on the plain meaning of the words of the section the authorities were enabled to make an order applicable to any street which was thronged or liable to be obstructed. Rowlatt J. did not dissent from this view, although he expressed himself as feeling some difficulty in accepting it. Shearman J., on the other hand, went further than Avory J. and expressed the view that the words were amply wide enough to authorize the making of a general order for the regulation of traffic where the ordinary

[47] [1914] 3 K.B. 395.

traffic of such a street made such a regulation necessary in the opinion of the local authority.

Teale v. *Williams*[47] was followed by other cases in the Divisional Court to which reference has been made in the judgments already delivered, and to which, therefore, I do not propose to refer, except to note that in *Edwards* v. *Wanstall*,[48] which came before Lord Hewart C.J., Swift and Branson JJ. in 1929, Swift J. expressed the view[49] that although he was bound by the decision in *Teale* v. *Williams*[50] he had "a good deal of "sympathy with the doubt expressed by Rowlatt J." It should also be noted that in *Etherington* v. *Carter*[51] Lord Hewart C.J. not only expressed the view that he was bound by the decision of *Teale* v. *Williams*,[52] but that he was in entire agreement with the view expressed by Shearman J.

The question which now falls to be considered is whether these cases can be considered to be rightly decided, depending, as they do, on the view that the words "in any case," etc., bear an unrestricted meaning. I have come to the conclusion that they cannot be so considered. In my view, in the context in which they appear in the section, the meaning of the words is limited by the preceding words "in all times of public processions, rejoicings or illuminations." It is a well-established rule of construction that if there are words in a section referring to particular instances from which a genus may properly be derived, then the generality of the words following will be restricted to that genus unless the context shows the contrary. Mr. Buckley has argued in this case that no genus can be derived from the particular instances given in this section. His contention is that the section deals with two classes of cases, the one being the class set out in the instances mentioned, the other the wider class implied in the words "in any case," etc. I find it difficult to accept this view. "Public processions, rejoicings, or illumina- "tions" may well be cases when the police require to have powers to regulate the traffic, for the very good reason that they are cases when the streets are liable to be thronged or obstructed. In my view, the type of case with which the section is intended to deal is something in the nature of an "occasion" when the streets, for reasons other than the normal day-to-day usage, are likely to contain more than the usual amount of traffic, whether on foot or otherwise. Such an occasion might well, of course,

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[47] [1914] 3 K.B. 395.
[48] 142 L.T. 288.
[49] Ibid. 290.
[50] [1914] 3 K.B. 395.
[51] [1937] 2 All E.R. 528.
[52] [1914] 3 K.B. 395.

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last more than a single day, but could not, in my view, be held to cover a substantial part of the year when the press of traffic, although heavy and liable from time to time to cause obstructions, is due to no more unusual a cause than the advent of summer.

In these circumstances, I agree that this appeal should be dismissed, even though it means overruling the decisions of the Divisional Court in *Teale* v. *Williams*[53] and the subsequent cases, always bearing in mind that this court will not lightly overrule decisions which have been standing for a number of years, and upon which many local authorities may have acted. It does appear that prior to the Road Traffic Act, 1930, the powers of the police for regulating traffic were mainly, if not wholly, derived from the section under consideration, and that in consequence many orders were made under the section which were, no doubt, for the benefit and convenience of the public. But the police now have ample powers under the Road Traffic Acts, and no inconvenience to the public is likely to be caused by the decision that the order in this case is ultra vires.

For these reasons, I, too, would dismiss this appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for J. G. Hillier, Town Clerk, Poole, in court below; Treasury Solicitor on appeal; Cripps, Harries, Hall & Co.*

E. D.

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[53] [1914] 3 K.B. 395.

In re GRIMTHORPE, DECD.

[1956 G. 709.]

1958
March 4.

Danckwerts J.

Costs—Trustee—Indemnity as to costs—Counsel's fees—Hearings adjourned and curtailed—Payment of full fees demanded—Whether trustees entitled to indemnity.

Barrister—Fees—Brief fee—Hearings frequently adjourned—Trustee's right to indemnity.

The intention of the Practice Direction dated October 27, 1953,[1] is to secure the result that trustees are entitled to be indemnified

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[1] Practice Direction (Trustees' Costs), dated October 27, 1953 [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159: "In cases in which trustees "are parties in their capacity as such, "and in which it is appropriate that "they should be indemnified as to "their proper costs and expenses of

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GRIMTHORPE, DECD., *In re.*

against all costs and expenses properly incurred by them in the course of their duties as trustees.

Where, therefore, trustees have paid in good faith to counsel fees which are not improper, the taxing master is not entitled to tax down those fees.

ADJOURNED SUMMONS.

By this originating summons the applicants, the trustees of the will and codicils of Lord Grimthorpe, deceased, asked for an order that their objections to the taxation of costs in the action under an order of Wynn-Parry J. dated May 13, 1957, might be allowed and that the matter might be referred back to the taxing master to vary his certificate accordingly.

On April 23, 1956, the trustees as applicants took out an originating summons to obtain directions enabling them to widen the range of investments of the trust moneys. The Attorney-General, representing the charity beneficially interested under the will, was the only respondent.

The matter came first before Roxburgh J. in chambers on June 4, 1956; after an hour's hearing the judge stood the summons over. On October 29, 1956, the matter came in chambers before Vaisey J., who was inclined to take an adverse view. On that occasion the matter only took some 12 minutes. Counsel's opinion was obtained in November, 1956. On May 13, 1957, the matter was heard in chambers before Wynn-Parry J. and an order was obtained in which a direction for taxation of the trustees' costs was given in the form of the Practice Direction, dated October 27, 1953.[1] The result of the taxation before the taxing master was that the fee which the trustees had paid to counsel in respect of the first hearing, before Roxburgh J., of 15 guineas, was taxed down to 10 guineas; the fee of 10 guineas which had been paid to counsel on the second hearing before Vaisey J. was taxed down to 5 guineas; the fee paid for the opinion of counsel was taxed down from 10 guineas to 5 guineas, and the fee paid at the final hearing before Wynn-Parry J. (which was to different counsel as the other counsel had taken silk more than a year before) of 15 guineas was taxed down to 5 guineas.

" the proceedings, the order as to the " costs of the trustees should direct " taxation of their 'costs and ex- " 'penses of and incident to this action " '[application] [matter]' without the " addition of the words 'as between " 'solicitor and client.' On such a " direction all costs and expenses pro- " perly incurred by the trustees will " be allowed by the taxing master. " Compare Trustee Act, 1925, s. 60. " The costs of other parties to the " proceedings will, as hitherto, be " ordered either (*a*) 'to be taxed' " (i.e., as between party and party) " or (*b*) 'to be taxed as between " 'solicitor and client.'"

Objections were taken on behalf of the trustees, which were as follows: "(i) The order of the Honourable Mr. Justice "Wynn-Parry dated May 13, 1957, provided for the costs and "expenses of the applicants of and incident to their application "to be taxed by the taxing master. (ii) Having regard to the "provisions of section 30 (2) of the Trustee Act, 1925, and to "the Practice Direction of October 27, 1953, and the observa-"tions made thereon by the Honourable Mr. Justice Vaisey on "November 3, 1953,[2] this form of order requires the taxing "master to allow to the applicants all the expenses properly "incurred by them in relation to these proceedings and no item "should be disallowed except on the basis of a finding that it "was improperly incurred. (iii) None of the items disallowed "was improperly incurred."

The taxing master in reply to that referred to the Practice Direction laying down a new standard for the taxation of the costs of trustees, and continued: "It provides a more generous "taxation than as between solicitor and client payable out of "a common fund, giving the trustee all the costs which he "is entitled to recover from the trust fund, and as stated by "[Vaisey J.] in the final paragraph [of the Practice Note] this "means 'almost the same as costs on an indemnity basis.' The "word 'almost' presumably means that a trustee or his solicitor "should not have an entirely free hand to incur expenses out of "the trust fund, nor should the discretion of the taxing officer as "to allowance or disallowance of items, or as to the quantum "of costs incurred, be fettered. The basis upon which all costs "are to be allowed by the taxing master is set out in [R.S.C.] "Ord. 65, r. 27 (29) as being what shall appear to him to have "been necessary and proper, and no costs shall be allowed, save "as against the party who incurred the same, which appear to "the taxing master to have been incurred or increased (inter "alia) 'by payment of special fees to counsel.' Although the "case was on a somewhat different point, the words 'special "'fees' were interpreted by Buckley J. in *Cavendish* v. *Strutt*,[3] "as meaning 'unusual or extraordinary or generous fees.' The "order under which the plaintiff's costs have been taxed related "to an application by trustees of a charity fund (inter alia) to "vary the investment clause of the trust. It was decided at an "early stage not to proceed under paragraphs 2 and 3 of the

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[2] [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408.

[3] [1904] 1 Ch. 524, 531.

"originating summons, and the matter came before the judge "in chambers on June 4, 1956, when after one hour's argument "it was adjourned sine die in view of the Trustee Investment "Bill which was then before Parliament. This Bill was subsequently withdrawn and the case restored and further heard by "the judge in chambers on October 29, 1956. After 12 minutes' "argument the judge raised a question of jurisdiction and adjourned the case into court for further argument. The further "hearing took place in chambers (by arrangement not in court) "on May 13, 1957, and the judge after reading a decision in a "similar case made his order. This hearing lasted 10 minutes. "The total time covered by all three hearings was one hour 22 "minutes and but for the fact that the hearings took place in "different terms no further fees in addition to the original brief fee "would be allowed. I have, however, taken into consideration "the basis upon which these costs should be taxed as mentioned "above in the two opening paragraphs of this answer, and in "view of all the facts have allowed a fee of 10 guineas on the "brief and further fees of five and 10 guineas respectively on "the further hearings making a total of 25 guineas. Another "factor I have taken into account is the change of counsel during "the course of the proceedings. I am of the opinion that it "would be wrong to allow higher fees than those I have allowed "to be paid out of this trust fund, and that those allowed by "me are fair and reasonable in all the circumstances, and that "the total fees of 40 guineas charged are excessive and are not "therefore properly incurred. They should, under R.S.C., Ord. "65, r. 27 (29) only be paid, if at all, by the party who has "incurred them, namely, the trustees personally and not out of "the trust fund.

"It is significant, although not a matter which has finally "influenced me in coming to the above decisions that the "[Attorney-General's] counsel . . . charged one fee of 10 guineas "to cover all three attendances."

The applicants now sought an order that their objections be allowed.

John Pennycuick Q.C. and *John Arnold* for the applicants. The Practice Direction issued in 1953 [4] set out the basic principle that a trustee shall be indemnified out of the trust fund in respect of all expenses properly incurred by him in the execution of his duties as trustee, and it is a first charge on the trust fund to supply this indemnity. To give effect to that, where trustees brought proceedings, it was the practice of the Chancery Court to make an order for taxation of the trustees' costs as between solicitor and client. Originally that formula meant the same as is now meant by "as between solicitor and own client." During the nineteenth century the practice grew up of treating "solicitor "and client" as different from "solicitor and own client" and as meaning taxation as between party and party but on a more generous scale. It is left in that case to the taxing master to set up his own standard as to what is fair and reasonable in distinction from the case of solicitor and own client where the taxing master has no discretion. As a result, in cases where trustees made a proper application and an order for taxation as between solicitor and client was made, the trustees would be disallowed part of their costs including especially counsel's fees; the result was that a trustee who had instructed counsel at a particular figure had to pay counsel himself or bilk him. Until 1953 it was the practice of trustees who had obtained an order for taxation of costs as between solicitor and client to pay the balance out of the trust fund, believing that they could do so. This was put an end to by Vaisey J. in *In re Dargie, decd.*[5] To meet the difficulty the Practice Direction of October 27, 1953, was made. It refers to "indemnity" and it is submitted that its effect and intention are clear, namely, that as taxation under the order is to be made in a new form, trustees should be allowed all their costs in fact incurred, with the qualification that they are not to be allowed costs which are improperly incurred. In *In re Dargie, decd.*[5] the action was by beneficiaries against trustees; an order for the taxation of the trustees' costs as between solicitor and client was made, not on an indemnity basis. But if that case were generally applied, it would cause injustices in that trustees would be disallowed properly incurred expenses. It was to remedy that that the 1953 Practice Direction was made. The question is whether that direction intended to give indemnity on solicitor and own client basis and, if so, whether it was effective to do that.

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[4] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159.

In this case the taxing master has construed it as meaning the old solicitor and client basis on a more generous scale. What the master did is completely at variance with the intention of the Practice Direction; and if he is right, the direction has no practical value. In support of his answer the master cited R.S.C., Ord. 65, r. 27 (29). As was explained in *Giles* v.

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[5] [1954] Ch. 16; [1953] 2 All E.R. 577.

Randall,[6] the prohibition contained in the second limb of the sub-rule—" but save as against the party who incurred the same " . . ." etc.—has no application to taxation on solicitor and *own* client basis but only to solicitor and client or party and party. The modern form of taxation of trustees' costs and expenses come for this purpose within the former class and the second limb has no application to it. The taxing master may disallow only that which is improper. What the taxing master must in the first place consider is whether this is an expense proper for trustees to incur on behalf of the trust estate. That must be approached by seeing what was the service the trustee obtained, from whom he obtained it and what he paid for it. It must then be asked, first, was it right for the trustee to obtain the service, e.g., counsel's opinion? secondly, was it right for the trustee to obtain the service from counsel of such standing? and, thirdly, was the fee which he paid to counsel the proper market value of the particular service from that particular counsel? These are the sort of tests the court would apply in an action for breach of trust by a beneficiary against a trustee alleging misappropriation of the trust funds.

The trustees here were entitled to bring this application and to obtain counsel's opinion in view of what went wrong on the two previous occasions. The trustees had to look to experienced counsel of standing and paid no more than the market rate for what they obtained. The taxing master refers to the amount of time spent on applications, etc.

[DANCKWERTS J. That is nonsense, because fees should be delivered with the brief. Counsel cannot be paid according to time.]

This Practice Direction has taken the matter out of solicitor and client basis and put trustees' costs on a new basis which gives trustees all costs properly incurred.

Denys Buckley, for the Attorney-General, said that he did not wish to address any argument to the court, but would refer the court on the meaning of " proper " to *In re Beddoe*.[7] " Proper " means " not improper."

DANCKWERTS J. This is a matter which has arisen on the taxation of trustees' costs under a Practice Direction, issued in 1953,[1] which provides: " In cases in which trustees are parties in " their capacity as such, and in which it is appropriate that they

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[6] [1915] 1 K.B. 290.

[7] [1893] 1 Ch. 547, 558.

[1] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159.

"should be indemnified as to their proper costs and expenses of "the proceedings, the order as to the costs of the trustees should "direct taxation of their 'costs and expenses of and incident "'to this action [application] [matter]' without the addition of "the words 'as between solicitor and client.' On such a direc- "tion all costs and expenses properly incurred by the trustees "will be allowed by the taxing master." Compare Trustee Act, 1925, s. 60. The costs of other parties to the proceedings will, "as hitherto, be ordered either (a) 'to be taxed' (i.e., as between "party and party) or (b) 'to be taxed as between solicitor and "'client.'" The reason for a direction of that kind was that it had been realized that a taxation on the basis of solicitor and client was merely on a slightly more generous scale than taxation on the basis of party and party, and that it did not restore to the person whose costs were being taxed amounts which in many cases had been paid out quite properly by the person in question and in the ordinary course of the duties of a trustee.

A long series of cases had established the position in regard to a taxation between solicitor and client, and it is not necessary for me to go through them. This direction was explained subsequently by Vaisey J. in a Practice Note that is headed "Practice "Note (Trustees' Costs),"[2] and it reads as follows: "At the "sitting of the court on November 3, 1953, Vaisey J. made "a reference to the Practice Direction with regard to trustees' "costs.[3] In the course of his observations his Lordship said: "'For years, ever since I can remember, it has been the practice "'on a summons by trustees, for such a purpose as the con- "'struction of a will, to direct that the costs of all parties "'should be taxed as between solicitor and client. That has "'continued, as I say, ever since I can remember, and has been "'the normal practice. It has recently been realized that, under "'a solicitor and client taxation, the trustees may not get the "'whole of what they are entitled to. A solicitor and client "'taxation is on a lower basis, not a higher basis, than the basis "'which is appropriate when trustees' costs are being dealt with. "'The matter arose, in a very plain form in the case of *In re* "'*Robertson, decd.*,[4] where the Public Trustee, who had his "'costs taxed as between solicitor and client, was disallowed "'the sum of £2 1s. in respect of a payment made for taking a "'shorthand note and for a copy of the transcript. That case

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[2] [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408.

[3] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159.

[4] [1949] W.N. 224; [1949] 1 All E.R. 1042.

" 'came before me, and in point of fact I felt able to vary the " 'taxing master's certificate and to allow that sum of £2 1s. " 'One thing is perfectly plain, and it is important that the profession should understand it. If a trustee submits to having " 'his costs taxed as between solicitor and client, he is entitled " 'to his costs as so taxed and nothing more. He is not entitled " 'to take the taxing master through his bill and then, when the " 'taxing master disallows certain items, to go away and say: " ' "That does not matter. I know I have wasted the taxing " ' "master's time, but I do not care about that. I do not care " ' "what he taxes off. I will help myself to whatever he has " ' "disallowed." That is wrong, and, hoping that I could help " 'resolve that difficulty in which trustees have found themselves, I, with the assistance of the chief registrar and the " 'chief taxing master and with the approval of all the judges of " 'the Chancery Division, came to the conclusion that a form " 'of words should be used which would give trustees more than " 'solicitor and client costs, that is to say, give them all the " 'costs to which they are entitled. The form of words which " 'was adopted for that purpose is taken from section 60 of the " 'Trustee Act, 1925, which relates to orders appointing new " 'trustees and is in these words [he read it and continued:] " 'It is, I think, plain that those words "the costs and expenses " ' "of and incident to any application" are intended to cover " 'the whole of the costs that the trustees were entitled to, and " 'mean almost the same as costs on an indemnity basis, or costs " 'as between solicitor and own client. It seemed appropriate " 'to use the words of the statute. Any suggestion that trustees " 'are being deprived of costs, and that this would be a more " 'hostile taxation than there has been under the old solicitor " 'and client taxation is absolutely wrong; the whole point of " 'making this change was to give the trustees more, to give " 'them a wider range and to make sure that all costs and " 'expenses which had been properly incurred would be allowed " 'on the taxation. It is an attempt to get the taxation on a " 'better, juster and higher basis than the old taxation, which, " 'in the judgment of myself and my brother judges, did not " 'always give the trustees that to which they were entitled.' " There is, of course, the word "almost" used there, which may be of some importance and with which I shall deal presently. In *In re Dargie, decd.*[5] Vaisey J. held that where Wynn-Parry J. had ordered that the trustees should get their costs on a solicitor and client basis on taxation, they were not entitled to pay themselves other expenses out of the trust funds, because there the costs they were to receive had been delineated by the judge in that way.

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[5] [1954] Ch. 16; [1953] 2 All E.R. 577.

[His Lordship then stated the facts of the present case, and, having read the objections taken by the applicants and the taxing master's answer, said:] The last observations of the taxing master seem to me to show a very strange appreciation of the position of a trustee. The taxing master's reference to the fee charged by counsel for the Attorney-General appears to me to be irrelevant.

It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out. It seems to me that the whole intention of the practice as laid down in the Practice Direction to which I have referred is to secure that result; the only doubt arises perhaps upon the word "almost," used by Vaisey J. in his explanation of the Practice Direction, in which he refers to its being "almost the same as "costs on an indemnity basis, or costs as between solicitor and "own client."

Mr. Pennycuick has contended, and I think he is right, that the distinction between that of a person instructing his own counsel and solicitor is that in that case he might pay whatever he likes; but, in the case of a trustee, he must use his judgment to try to save the estate money which should not be unnecessarily paid out. It seems to me quite wrong to look at the event afterwards, and counsel's fees having been incurred, and having been demanded by counsel's clerk on the basis that that fee was asked for, having regard to the complexity of the matter and the standing of counsel in question, to say that counsel has been paid too much. It would undo the whole effect which was intended by the Practice Direction if the master were entitled to tax fees to counsel, or other expenses that had been paid in good faith by the trustees, on the basis that they were payable by them. The trustees could not get out of paying them merely because the master thought that counsel might have been paid a somewhat smaller sum. It seems to me to be a wrong adoption of the standard laid down by R.S.C., Ord. 65, r. 27 (29), which does not

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really apply in this case at all; it is not a case of undue generosity—the standard is whether it is proper or improper. It seems to me that the remarks about "generous fees" and so on have really no application to the trustees, who have had to pay the fees to counsel as being the proper fees payable to them. In those circumstances, therefore, it seems to me quite plain that in the present case the taxing master went wrong in principle, and that his order must be set aside.

The taxation must be set aside in respect of these items, and the items actually paid by the trustees in good faith must be allowed.

Objections allowed.

Solicitors: *Lee, Bolton & Lee; Treasury Solicitor.*

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Dec. 20.

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In re McMORRAN, DECD.
MERCANTILE BANK OF INDIA LTD. *v.* PERKINS AND OTHERS.

[1957 M. 1435.]

Conflict of Laws—Power of appointment—Special power—Power under English will—Donee domiciled in Scotland—Scottish will—Whether power exercised by will—Whether principles of construction of Scottish or English law applicable.

Conflict of Laws—Scottish and English law—Power of appointment—General disposition by will—Whether exercise of special power—Conflicting rules.

By a will dated 1927 and a codicil dated 1932, both in English form, a father resident and domiciled in England left part of his estate on trust for his son for life with remainder to the son's issue as he should appoint. He was also given power to appoint to his surviving wife a life or less interest in any amount up to half of his share. The father was survived by the son who, being resident and domiciled in Scotland, made in 1943 in Scottish form a will followed by a "trust disposition and settlement." By this latter he devised and bequeathed to his trustees the whole estate, inter alia, over which he "might have the power of disposal" at the time of his death in trust as to the residue thereof in favour of his children, subject to a life interest in favour of his wife.

It was asked by this summons, inter alia, whether the son had by the trust disposition and settlement exercised the power to appoint half the income of his share under the father's will to his wife and the corpus to his issue. The decided cases indicated that an English court applying English principles of construction would hold that the power had not been exercised—*In re Knight, decd.* [1957] Ch. 441; [1957] 2 All E.R. 252—but the evidence was that a Scottish court applying Scottish principles would hold that it had done so:—

Held, (1) that the principle to apply was that in questions of construction an English court must find the true meaning of the appointor from the words he had used in the frame in which he had used them.

(2) That, the document purporting to exercise the power being a will in Scottish form and using Scottish terms of art, its language must take effect according to Scottish law, which was familiar with powers and their exercise.

(3) That in accordance with the evidence the son's will constituted a valid exercise of the English power in so far as the execution was not excessive; so that the son's will operated as an appointment of one-half of the income to the wife, and of the corpus and the other half of the income to the children.

In re Simpson [1916] 1 Ch. 502 and *In re Waite's Settlement Trusts* [1958] Ch. 100; [1957] 1 All E.R. 629 distinguished.

ADJOURNED SUMMONS.

This summons raised the question whether a purported appointment, contained in a Scottish will, in exercise of a special power of appointment conferred by an English will, was an effective exercise of that power.

The following statement of the facts is taken in substance from the written judgment of Harman J.: Thomas McMorran (hereinafter called " the father ") made his will in English form on August 4, 1927. In it he described himself as of Frithwood House, Eastbury, in the County of Hertford, and of 149, Leadenhall Street in the City of London, merchant. He was at all material times resident and domiciled in England. The plaintiff was the present trustee of his will which was proved in England in 1940. By it the father made a general gift to his trustees on the usual administrative trusts. The beneficial trusts, as varied by a codicil dated November 29, 1932, were, as to two-thirds for the wife while his widow, and subject to that for his children equally but settled as to each share on trust for the child for life with remainder to such of the issue of the child as the child should by deed or will appoint, but no appointee was to take before attaining 21: the gift in default of appointment was for grandchildren of the testator at 21 or marriage. Superimposed on this was a further power for each child by deed or will to

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appoint to a surviving spouse a life or less interest in any part not exceeding one-half of the income of that child's share. The trustees were empowered to pay over a child's share to him or her absolutely on attaining 25.

The father had four daughters and one son, Thomas White McMorran, hereinafter called "the son." The father's widow died in 1948. There remained undistributed two-thirds of the son's share, represented at the date of this summons by investments worth about £30,000. The son became resident and domiciled in Scotland, and made his will in Scottish form by a trust disposition and settlement dated September 8, 1943. The relevant portion of that instrument was as follows: "I assign, "dispose, devise, legate and bequeath to them, as trustees under "these presents (the persons or person acting for the time as "trustees or trustee under these presents being hereinafter "referred to as 'my trustees') the whole means and estate, "heritable and movable, real and personal, wherever situated, "which shall belong to me, or over which I may have the power "of disposal at the time of my death in trust for the following "purposes, videlicet: (First) For payment of my debts, sickbed, "funeral and executory expenses: (Second) I direct my trustees "to pay to my wife Mrs. Mary Anne Donald or McMorran in "the event of her surviving me the sum of five hundred pounds "free of duty as soon as possible after my decease to enable her "to meet current expenses: (Third) I direct my trustees in the "event of my wife surviving me to deliver and pay to her free "of all death duties, videlicet: (One) to deliver to her the whole "household furniture and plenishing of every kind whether "useful or ornamental belonging to me at the time of my death, "and (Two) to pay to her during her lifetime after my death "the free annual income of the residue of my estate, but "declaring that she shall be bound as a condition of receiving "the said income to maintain and educate our children in a "manner suitable to their station in life until they are able to "maintain themselves: (Fourth) I direct my trustees to hold "the residue of my said means and estate for behoof of my "children and the issue of such of them as may, before attaining "a vested interest as hereinafter provided, die leaving issue, and "to account for and pay over the same to the said children and "remoter issue equally share and share alike, the issue of any "child who shall have died before attaining a vested interest "taking their parents' share, original and accrescing, equally "among them if more than one: Declaring (one) That the shares

" of residue falling to my children or remoter issue shall vest " and be payable on the death of the survivor of my said wife " and me if the children shall then have attained the age of " twenty-five years complete. . . ."

That instrument was on the son's death in 1943 registered according to Scottish law and was later resealed in England. The son had no powers of appointment save those conferred on him by the father's will. This summons, taken out on June 20, 1957, by the bank as sole trustee of the father's will, asked, inter alia, (1) whether the son, by the trust disposition and settlement, exercised over the fund representing the undistributed part of his settled one-fifth share of the father's residuary estate (a) the power to appoint to any wife who might survive the son during the residue of her life or for any less period any part not exceeding one-half of the annual income of that share; (b) the power to appoint the corpus of that share among his issue. The defendants to the summons were, first, the son's widow, who had remarried, and, second, third and fourth, his children, two of whom were infants.

Edmund Wright for the bank as trustee.

T. J. Barnes for the widow and the elder son. In the present case the power has been validly exercised whether English or Scottish law applies. The Scottish lawyers' evidence shows that the reference to property " over which I may have the power of " disposal at the time of my death " makes it clear that the will would in Scottish law be held to constitute a valid execution of the English power.

The interpretation of a foreign will of movables is governed by the law of the testator's domicile, and that still holds good where the testator is exercising a general power created by an English will or settlement. English law applies only where (a) the will expresses the intention that it shall, or (b) the foreign law concerned knows no doctrine of powers: see *In re Price*[1]; *In re D'Este's Settlement Trusts*[2]; *In re Pryce*[3]; *In re Simpson*[4]; *In re Lewal's Settlement Trusts*[5]; *In re Waite's Settlement Trusts.*[6] It must be conceded, however, that not all the judgments in these cases are reconcilable.

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[1] [1900] 1 Ch. 442; 16 T.L.R. 189.

[2] [1903] 1 Ch. 898.

[3] [1911] 2 Ch. 286.

[4] [1916] 1 Ch. 502.

[5] [1918] 2 Ch. 391; 34 T.L.R. 538.

[6] [1958] Ch. 100; [1957] 1 All E.R. 629.

The same rule also must, on principle, apply in the case of special powers. For purposes of interpretation there can be no valid distinction between the two. Accordingly, Scottish law applies in the present case. In Scottish law a will containing a "general settlement" is intended to, and does, exercise a special power (particularly where there is a specific reference to powers of disposition), unless a contrary intention appears in the will: *Alexander's Trustees* v. *Alexander's Trustees* [7]; *Gemmell's Trustees* v. *Shields*.[8] In the present case no contrary intention appears. It follows that the power has been exercised.

Lastly, even if English law does apply, there is still a sufficient indication that the power was intended to be exercised under the principles laid down in *In re Knight, decd.*,[9] in which it was held that the intention to exercise a special power must be gathered from the whole will.

Thus, the power has been exercised whether English or Scottish law applies.

E. I. Goulding for the younger son and the daughter, both infants. Whether English or Scottish law applies, there are so many indications against the exercise that the will does not operate to exercise the power. The estate is left to "... my "trustees ... for the following purposes ..." The word "appoint" is not there One of the "purposes" is the payment of the debts. The will refers to "my estate."

It is clear that English law applies. The power is a special power, the will conferring it is an English will and all that the Scottish will has done, or can have done, is to purport to exercise on behalf of the donor a power to make a choice. Therefore, the words exercising the special power must be read into the document creating that power and be effectuated in accordance with English, not Scottish, law: *Muir* v. *Muir* [10]; *Pouey* v. *Hordern* [11]: *In re Walker*.[12] If that be so, there was clearly no intention to exercise the power, which, accordingly, has not been exercised.

T. J. Barnes in reply. *Muir* v. *Muir* [13] is not relevant. Special powers are read into the will conferring them only when they have been exercised. An appointor's intention must be found by having regard to his words according to the meaning

[7] 1917 S.C. 654.

[8] 1936 S.C. 717.

[9] [1957] Ch. 441; [1957] 2 All E.R. 252.

[10] [1943] A.C. 468.

[11] [1900] 1 Ch. 492; 16 T.L.R. 191.

[12] [1908] 1 Ch. 560.

[13] [1943] A.C. 468.

which they bear in the country of his domicile. For that purpose there is no distinction between special and general powers.

Cur. adv. vult.

December 20. HARMAN J. read a judgment, in which he stated the facts substantially as set out above, and continued: The plaintiff has taken advice in Scotland on this matter, and has been advised that in a Scottish court the power would be held to be well exercised applying Scottish principles of construction. On the other hand, in an English court applying English principles of construction it seems likely that the powers would be held not to have been exercised: *In re Knight, decd.*[1] This is a most unfortunate divergence. Both systems are familiar with powers both general and special, and both apply the same tests, but the courts of the two countries construe the language differently, the Scots holding that a general reference in a will to powers which the testator has or may have is a sufficient reference to a special power, while the English courts, generally speaking, take the contrary view. See, for instance, the headnote in *In re Knight, decd.*[2] "A testatrix," states the headnote, "gave her residuary estate on trust for sale and directed her "trustees to stand possessed of the residue of the proceeds after "payment of expenses on trust for a daughter and for the "children of a deceased son and a daughter in specified shares. "The residuary estate was expressed as 'including any property "'over which I may have any power of disposition at the date "'of my death.' Under the terms of the will of the testatrix's "father she had a special power of appointment of a share of "the residue of her father's estate amongst a class of objects "which included all the persons who were beneficially entitled to "her own residuary estate. The class of objects did not include "her trustees:—*Held*, that the intention to exercise a special "power must be gathered from the whole will; and that the "words used by the testatrix were not, in the context of her "will, apt to exercise the special power of appointment conferred "on her by her father's will."

The first question, therefore, to be answered is whether the Scots or the English rule should be followed. The cases on the question whether foreign wills execute English powers are numerous, and I have not found them easy to reconcile. Most of them concern general powers where a difficult question emerges, namely, whether section 27 of the Wills Act ought to be imported into a foreign will notwithstanding the rule that a will, generally speaking, should be construed in accordance with the law of the testator's domicile. I begin with *In re Price*,[3] a case of a general power, where the headnote reads as follows: "A will of a domiciled foreigner, which is valid by the law of "the testator's domicile and has been recognized as a valid will "in this country by the Probate Division, is capable of operating "as an execution of a power of appointment by will over "personal estate under an English instrument, although the "formalities required by sections 9 and 10 of the Wills Act have "not been observed." Then: "Although as a general rule a "will is to be construed according to the law of the testator's "domicile, this rule does not apply where there are indications "on the face of the will that the testator wrote it with reference "to the law of some other country." This case shows that, so far as validity is concerned, a foreign will admitted to probate in this country, notwithstanding that it did not comply with English formalities, is capable of executing an English power. This is now well settled law. There was there an indication that the will was written with an eye on the law of this country, and it is arguable that this was the ground of the decision. Stirling J. said[4]: "In general a will is to be construed according to the law "of the domicile of the testator: 'but this is a mere canon of "'interpretation, which should not be adhered to when there is "'any reason, from the nature of the will, or otherwise, to "'suppose that the testator wrote it with reference to the law "'of some other country': Dicey, Conflict of Laws, p. 695. "Considering first the law of France, according to which prima "facie the will is to be construed, the evidence shews that the "will of Madame Forfillier is a complete disposition of all the "property which she could dispose of; but it also appears that "the mode of disposition by appointment is not practised in "France, and that if a French court had to consider the effect "of the will in this respect it would apply the English law. It "is contended with regard to the law of England that the "provisions of the Wills Act including section 27 are inapplicable, and that consequently the law of England applicable is "the law as it existed before that Act, and that, there being no "reference in the will either to the power or to the property, "it is not a good execution of the power. If I am to apply the "law as it existed before the Wills Act, questions of difficulty

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[1] [1957] Ch. 441; [1957] 2 All E.R. 252.

[2] Ibid.

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[3] [1900] 1 Ch. 442.

[4] Ibid. 452.

"might arise; but it appears to me that I can decide this case "upon another ground. The testatrix says, 'I declare that this "'will annuls all the others . . . and that it shall thus be "'considered in England the same as in France.' I think that "that amounts to a declaration by the testatrix that she meant "the will to operate as her last will in England as well as in "France. I think it is indicated upon the face of the will that "she wrote it with reference to the law of England as well as the "law of France. Therefore I think that I am entitled to apply "the rules of construction which would by English law be "applied to a will expressed in the same terms and of the same "date as that annexed to the letters of administration, including "the rule of construction introduced by section 27 of the Wills "Act." Stirling J.'s decision, apart from the special point, did turn on the fact that French law has no knowledge of powers and therefore would apply English law including section 27.

In the same volume is *Pouey* v. *Hordern*,[5] a case of a special power, where the judge decided that the will which purported to exercise the power was capable of doing so, notwithstanding that the testatrix by French law could not, so far as her own property was concerned, have disposed of it except to a limited extent. Farwell J. said[6]: "But the power in this case is a special "power, and the execution of such a power does not bring the "appointed property into the will of the appointor at all, but "operates as a nomination of the persons whose names are to be "inserted in the settlement as entitled in remainder in lieu of "the power of appointment. There is, therefore, no disposition "of property belonging to the testatrix."

This last principle does not apply to a general power as is shown by *In re Pryce.*[7] Here, although it was held that the testatrix domiciled in Holland could, by a will in Dutch form, exercise the power and so make the appointed fund her own for all purposes, she could dispose of it only so far as Dutch law gave her testamentary capacity. A like conclusion was reached in *In re Lewal's Settlement Trusts*,[8] where Peterson J. held that the testatrix, though an infant, could exercise a general power by a will in French form, but only to the extent of her testamentary capacity according to the law of France.

The case of *In re D'Este's Settlement Trusts*[9] reached a different conclusion as regards section 27 and has not been followed. The reasoning, however, of Buckley J. seems to me to be apposite, where he says[10]: "What would be the "court of construction to determine the effect of this French "will? This being a foreign instrument, executed by a "foreigner in her domicile, prima facie it would have to be "considered according to the law of the domicile. That is "not, indeed, disputed. But it is said, and said truly, that "where you have a power exercisable by will, the thing which "you look at must no doubt be a will, otherwise it is not an "exercise of the power; but that, when you have got it and "read it, it takes effect not as a will—because ex hypothesi the "property does not belong to the testator—but operates under "the settlement containing the power. That is true. Then it is "said that I must take this French document and read it, not as "a will in the sense in which I have explained, but as if the "directions contained in it were introduced into the instrument "which contained the power. That is quite right; but how must "I read it? I have, referentially, to introduce into the instrument which contains the power a foreign document. I have "to see whether the power was exercised, and therefore to find "out the meaning of what is expressed by the donee of the "power. Now how am I to ascertain the meaning of the donee "of the power? I must ascertain it according to the law of the "place applicable to the document executed by the donee, and "to the domicile of that person, and that law is to be taken as "the law governing its construction. If I do that, I have to "read the French will and say what its meaning is according to "the principle of French construction, excluding, therefore, "section 27, which is a rule for English construction. The "evidence as to French law is that powers of appointment are "unknown in France. If a court of construction in France were "to read this document for the purpose of determining its effect "as regards this power, it would have to be informed by evidence "what a power of appointment is in our law; and, having learned "what it is, it would have to apply the proper principles of "construction in France to ascertain whether or not this property "passed under the instrument. Section 27, which is a rule of "construction here and not there, as it appears to me, would "have no place in the discussion."

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[5] [1900] 1 Ch. 492; 16 T.L.R. 191.

[6] [1900] 1 Ch. 492, 494.

[7] [1911] 2 Ch. 286.

[8] [1918] 2 Ch. 391.

[9] [1903] 1 Ch. 898.

This case was criticized by Neville J. in *In re Simpson*,[11] where he says in effect that Buckley J.'s conclusion did not follow from his premise. In this I respectfully concur, for the

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[10] [1903] 1 Ch. 898, 903.

[11] [1916] 1 Ch. 502.

French law not knowing powers must necessarily have recourse to the English law when confronted with one. Neville J. says[12]: "The evidence shows that the words used would be sufficient "according to French law to pass all her personal property. A "power of disposition by will over property not belonging to the "testator is, however, unknown to French law, and in ascertaining whether the will disposed of such property a French court "would be compelled to inquire what such a power was and how "it could be executed by an English will. The answer would "be that the bequest if contained in an English will would be "sufficient to pass the property subject to the power. And so "in an English court the construction which would be applied to "an English will must be applied to the construction of a French "will valid in England so far as regards the power. Lord Wrenbury, then Buckley J., in *In re D'Este's Settlement Trusts*,[13] "held that section 27 of the Wills Act did not apply to a French "will, holding, I think, that if sections 9 and 10 applied the will "was not entitled to probate, while if they did not apply neither "could section 27 apply. I am unable to see why." Then he continues at the bottom of the page: "I think I am right in "saying that Buckley J.'s decision depended mainly on the view "that French rules of construction must be applied in determining the meaning of a French will, and, if so, section 27 "could not apply because French law knows nothing of "section 27. But neither does it know anything of powers of "appointment by will, so that a resort to English law was "essential, involving, as it appears to me, the consideration of "what was necessary for the execution of the power by will." Neville J. also, in an earlier passage in his judgment, expressed this opinion[14]: "It will appear later that in my judgment in "regard to a power, English rules of construction must always "apply, at all events where powers are unknown to the law of "the domicile."

If this means that the language must be construed in all respects as though it appeared in an English will, I think it may be too broadly stated. *In re Walker*[15] seems to show that a Scots will is perfectly capable of exercising an English power if on its true construction it does so. In the recent case of *In re Waite's Settlement Trusts*,[16] again a case of a general power, my brother Danckwerts made observations which seem to show that he would apply the English rules of construction to the foreign document. So far as validity is in question and the question of capacity, I agree with him, but if he intended to go further and import the instrument exercising the power into the English law for all purposes, I take leave respectfully to doubt his conclusion. Anyhow, he was not dealing with this question.

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[12] [1916] 1 Ch. 502, 508.

[13] [1903] 1 Ch. 898.

[14] [1916] 1 Ch. 502, 507.

[15] [1908] 1 Ch. 560.

[16] [1958] 1 Ch. 100.

None of the cases, in my judgment, really touches the point which I have to deal with here. This is a special power given by an English will, and the instrument exercising such a power must, therefore, for many purposes, be read back into the English will because the appointor is not disposing of property in which he himself has an interest, but is merely, so to speak, the agent of the donor exercising a power of selection. See Lord Romer's observations in *Muir* v. *Muir*.[17] From this it is argued that the words exercising the power must be read for all purposes into the English will, and be given such effect as the law of England would give them. I do not agree with this. The fact that a Scots will is written in the English language makes it none the less a foreign instrument. This particular will contains a number of terms of art only to be understood by reference to the Scottish law, and I think the general principle must still apply that in questions of construction, as opposed to questions of validity and capacity, the English court must find the true meaning of the appointor from the words he has used in the frame in which he has used them. This testator made his will with an eye, so to speak, turned exclusively on the Scottish legal system, and the document can only be understood by reference to that system. It would therefore, in my judgment, be wrong to pick out the words alleged to constitute the appointment and give them an effect which the English law would give them, for the testator, making his will in Scottish form and using Scottish terms of art, must be supposed to have meant them to signify that which they would signify to a Scottish court. If this be right, then the English court must ascertain the effect which the Scottish court would give to the relevant words. This is not a case like the French cases, where the foreign system has no knowledge of powers and must, therefore, refer back to the English one. As I have said, Scots law is as familiar as English with powers. Scottish law is a question of fact in an English court and, when I turn to the evidence, that is contained in the opinions of two Scottish lawyers, both of whom opine that a will in the form of the son's will here would, according to

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[17] [1943] A.C. 468, 481.

Scottish principles, be held to be a valid exercise of the English power, having regard to the fact that reference is made to property "over which I may have the power of disposal at the "time of my death." One of the Scots lawyers expresses the view that in Scotland *In re Knight, decd.*[18] would have been decided the other way. I have considered two of the Scots cases cited, namely, *Alexander's Trustees* v. *Alexander's Trustees*[19] and *Gemmell's Trustees* v. *Shields*,[20] and they seem to me to justify the conclusion of the Scottish lawyers. One of these, it is true, takes the view that the question is a difficult one on which Scottish trustees might well seek the opinion of the Scottish court. Nevertheless, he expresses his opinion to agree with that of the other Scottish lawyer, who, for his part, has no doubts to put forward. In the circumstances I must, dealing with the question, as I do, as one of fact, accept the conclusion at which both arrive, and hold that the Scottish will must be taken to have operated to exercise the special power given to the testator by the English will of the father so far as it can do so, and notwithstanding that the execution is excessive. In the case of the power to appoint to a wife, this only extended to one-half the income, and the exercise can only be valid to that extent. As to the power to appoint to issue, this, if exercised, operated in favour of the son's children, the same persons as take in default of appointment. The children, therefore, take the income of the half of the fund not appointed to their mother in any event. It is uncertain whether the question of the validity of the deferment of vesting sought to be imposed by the Scottish instrument will arise. It has not been argued before me, and I do not propose to decide it at present.

I propose, therefore, to answer question 1 of the summons by declaring that the trust disposition exercised the power in the case of the wife to the extent of one-half.

Declaration accordingly.

Solicitors for all parties: *Bird & Bird.*

K. R. A. H.

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[18] [1957] Ch. 441.
[19] 1917 S.C. 654.
[20] 1936 S.C. 717.

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Lord Evershed M.R., Romer and Ormerod L.JJ.

BROWN *v.* RAPHAEL.

Contract—Representation—Representation of opinion—Implied representation of reasonable grounds therefor—Sales particulars—Reversion on death of annuitant—Annuitant "believed to have no "aggregable estate"—Statement as to material fact by well-known solicitors to induce purchase—No reasonable supporting grounds—Vendor's means of knowledge superior to purchaser's.

The sale particulars prepared for the vendor of an absolute reversion in a trust fund on the death of an annuitant contained the statement that the annuitant was "believed to have no aggreg- "able estate." That statement of belief was made honestly by solicitors for the vendor, but they had no reasonable grounds for so believing. The purchaser, having relied on this representation, sought rescission:—

Held, that he was entitled to rescind on the ground of an innocent misrepresentation since, as (1) the statement was one obviously and vitally affecting the subject-matter being offered, and (2) the vendor was in a far stronger position—to put it at its lowest—than the purchaser to ascertain the relevant facts, there must be imported into the representation the further representation that he, being competently advised, had reasonable grounds supporting that belief.

Smith v. *Land and House Property Corporation* (1884) 28 Ch.D. 7 applied.

Decision of Upjohn J. affirmed.

APPEAL from Upjohn J.

The following statement of the facts is taken substantially from the judgment of Lord Evershed M.R.

Lot 11, in a sale by auction held on February 17, 1955, was described in the sale particulars as follows: "Lot 11. The abso- "lute reversion receivable on the decease of a lady aged 69 (born "December 30, 1885) to the whole of a trust fund now represented "by £8,000 2½ per cent. consols, of estimated value £5,210. "*This sum has been set aside to pay an annuity of £200 per "annum to the lady mentioned above. The trustee is the Public "Trustee. Estate duty will be payable on the death of the "annuitant who is believed to have no aggregable estate.*" By additional conditions of sale as to lot 11 it was stated first that the reversion was derived under a will dated March 13, 1916, and that the probate of the will was to constitute the root of title. The conditions continued: "2. The vendor sells as the trustee in "bankruptcy of the beneficial owner. 3. The reversion is sold "subject to all death and other duties which may be or become "payable in respect thereof. The above information regarding "duty so payable is believed to be correct, but the vendor accepts "no responsibility as to what duties will in fact become payable "nor as to the amount which will become payable and no compensation shall be paid or allowed in respect of any error as to "duties." Condition 4 stated where completion was to take place. Condition 5 was that the particulars of the investment were as provided by the Public Trustee Office on a particular date, and were "believed to be correct and the reversion is sold subject "to such variation as may occur therein before completion of sale. "The vendor accepts no responsibility for the estimated value of "the investment." Condition 6 related to expenses and condition 7 to requisitions on title. Condition 8 stated that the sale was subject to a reserved price. Condition 9 provided: "These "additional conditions shall prevail notwithstanding anything "inconsistent with or contrary thereto in the general conditions "which (in so far as they are not varied by these conditions) shall "apply to the sale of this lot." There followed in heavy leaded type. "Solicitors as to lot 11—Messrs. Oscar Mason & Co., "Cliffords Inn, Fleet Street, E.C.4."

Ernest Brown entered into a contract for purchase of the reversion at the sum of £2,825, but by January, 1956, the contract had not been completed and he sought to rescind, stating that he had been misled by the representation which he said was to be found in the part of the particulars printed in italics, that is, the words "who is believed to have no aggregable estate." The vendor, the defendant, repudiated the claim and by a counterclaim sought to enforce the contract.

At the trial of the action before Upjohn J. it appeared that the statement in the particulars had been made by a managing clerk of the solicitors named in the particulars, who normally acted as a litigation clerk. He had made it without any comprehension of the meaning of the words "no aggregable estate," or of their significance to a would-be purchaser. The grounds on which the belief were expressed were inquiries addressed to the bankrupt, a Mrs. Heath, who was a half-sister of the annuitant but was not, apparently, on friendly terms with her, the bankrupt's mother and, at her suggestion, another lady, a Mrs. Gould, whose relationship with the persons concerned was not at any time made clear. In addition, a communication was addressed to the annuitant, Mrs. Ritchie, herself. None of these sources of information was productive. Mrs. Ritchie passed the letter to her brother, who told the inquirer that it was none of his business. Mrs. Gould said that she had had no direct contact with Mrs.

Ritchie for some time, but she said that Mrs. Ritchie spent some part of her time at Nice. Mrs. Heath added very little, though both she and Mrs. Gould indicated that they did not think that Mrs. Ritchie would be likely to leave very much.

Upjohn J. acquitted the defendant and his agents and representatives of dishonesty, a ground which had been emphasized in the statement of claim, but he held that the plaintiff was entitled to relief on the basis of an innocent material misrepresentation on which he had acted.

The defendant appealed.

I. J. Lindner Q.C. and *T. Michael Eastham* for the defendant. The statement that the vendor believed that the annuitant had no aggregable estate was a statement of opinion which was made, as the judge found, honestly. It was not made in circumstances such as those envisaged by Bowen L.J. in *Smith* v. *Land and House Property Corporation*,[1] where the vendor had knowledge not available to the purchaser, and the character of the statement carried with it an implication that it was founded on reasonable grounds. [Reference was also made to *Bisset* v. *Wilkinson*.[2]] The court will not, it is submitted, readily come to the conclusion that an opinion of belief carries with it such an implication, and will only do so where there is inequality of opportunity between the vendor and purchaser in having access to vital information. It is easier to prove inequality in a case where the vendor is selling property of which he is the beneficial owner than in the present type of case where the defendant is selling as a trustee. In this case he was expressing an opinion on matters which were not necessarily any more within his knowledge than that of the purchaser.

The plaintiff should not be allowed to take the point that the expression of opinion carried with it any such implication. It was not taken before Upjohn J. and is not mentioned in the notice of appeal. Nor should the plaintiff be allowed to amend the pleadings at this stage.

[*Montgomery White Q.C.* for the plaintiff, intervening, submitted that the point was sufficiently pleaded, and referred to *Nocton* v. *Lord Ashburton*,[3] *Swinfen* v. *Lord Chelmsford*[4] and *London Chartered Bank of Australia* v. *Lemprière*.[5]]

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[1] (1884) 28 Ch.D. 7, 15.

[2] [1927] A.C. 177; 42 T.L.R. 727.

[3] [1914] A.C. 932; 30 T.L.R. 602.

[4] (1860) 5 H. & N. 890.

[5] (1873) L.R. 4 P.C. 572.

[The court, after discussion, held that the point was open on the appeal and that no amendment of the pleadings was required.]

Lindner. There is always a great element of chance in purchasing a reversionary interest. What was being sold was the reversion, not the annuity itself, and the defendant vendor was in no better position than the purchaser to know the means of Mrs. Ritchie, the annuitant. [Reference was also made to *The Moorcock.*[6]]

The issue was whether the defendant honestly believed what he said. The judge has acquitted him of fraud and, however stupid the statement of opinion may have been in this case, he is entitled to say that the matter was dealt with entirely in the office of the solicitor and he was entitled to rely on his lawyer and to assume that proper inquiries had been made. [Reference was made to *Derry* v. *Peek.*[7]]

[Ormerod L.J. The name of reputable solicitors was stated on the auction particulars and there was an inevitable inference that the trustee had been advised by competent solicitors and on that advice had reached a conclusion in his own mind that there was no aggregable estate. When the representation was made the purchaser had no means of finding out about the means of Mrs. Ritchie at all.]

The circumstances of the annuitant were not facts peculiarly within the knowledge of the defendant. But the plaintiff has to go further than that to come within Bowen L.J.'s statement.[8] He has to show that the vendor knew facts which falsified his statement of opinion and that those facts were peculiarly within his knowledge. The judge has acquitted the defendant of fraud here and the plaintiff has not shown that the defendant had no grounds for the statement which the judge found he honestly believed. He has not even shown that in fact the annuitant has or will have aggregable estate. Indeed, the fact that she is living in Nice may be said to point in the other direction, for she may be domiciled outside the United Kingdom. The solicitor's clerk had formed his opinion on grounds which to the court may not appear conclusive, but the best he could do was to get some information as to the financial circumstances of the annuitant. He could not compel her to disclose anything.

[6] (1889) 14 P.D. 64; 5 T.L.R. 316.

[7] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[8] 28 Ch.D. 7, 15.

[Lord Evershed M.R. The question is whether he was justified in making this representation.]

He knew nothing contrary to his representation and it is submitted that what he said was reasonable in the circumstances. If the grounds which he had were not reasonable, the court would have to consider what would be reasonable grounds. It is not easy to decide what is and what is not aggregable estate. But even if the grounds were not reasonable, the trustee defendant was entitled to rely on the statement as affording him reasonable grounds.

It is admitted that this was a statement inducing a contract and that the words had importance in relation to the value of the interest, but by the additional conditions of sale No. 3 the vendor is expressly exonerated from liability for death duties and other duties payable and did not accept any responsibility to make compensation for any error.

[Lord Evershed M.R. That condition is directed to an entirely different matter, namely, after-acquired estate.]

[Ormerod L.J. If the plaintiff is entitled to rescind the contract, it does not matter what the conditions are. They would fall to the ground with the rest of the contract.]

It would be strange to grant rescission of the contract for an innocent misrepresentation when, if the contract had been upheld, there could have been no liability for duty at all. This misrepresentation, if there were one, went to the value of the thing sold and not to the nature of the thing itself.

Montgomery White Q.C. and *E. I. Goulding* for the plaintiff were not called on.

Lord Evershed M.R. The present action and appeal arise out of a sale at auction on February 17, 1955, of a certain property, an absolute reversion in a trust fund. Because I think much in the case depends upon the exact nature of the subject-matter of the sale as stated in the particulars, I shall take time to read what was described as "Lot 11" more or less fully.

[His Lordship read the particulars set out above, and having stated the facts, continued:] At an early stage in this appeal the question arose whether, on the pleadings, if fraud was rejected, it remained open to the plaintiff to proceed on the ground of innocent misrepresentation; and we came to the conclusion that he was so entitled. No question now arises as to dishonesty, so that we must now consider the case on the footing that

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it is open to the plaintiff to proceed on the basis of innocent misrepresentation.

In order that he may succeed on such a ground it is, of course, necessary that three things should be established. He must, first, show that the language relied upon does import or contain a representation of some material fact. Second, he must show that the representation is untrue, and, third, he must show that the plaintiff in entering into the contract was induced so to do in reliance upon it. The judge concluded all those three matters in the plaintiff's favour, and he therefore gave to the plaintiff the necessary relief in the action and dismissed the counterclaim.

I will say at once that, although Mr. Lindner has put all the points forcibly and attractively before us, in my judgment there is no ground shown for this court to disturb the judge's conclusions. I will, therefore, deal, though I hope at not too great length, with each of the three essential points in turn.

The first is, to my mind, the most significant and perhaps the most difficult: is there here a representation of a material fact? The essential words are those which I have already read more than once—" who "—that is the annuitant—" is believed to have " no aggregable estate." At first sight, therefore, this is a statement of an opinion; but, of course, a statement of opinion is always to this extent a statement of fact, that it is an assertion that the vendor does in fact hold the opinion which he states. But, if that was all there was in the matter, plainly the defendant would succeed on the judge's finding; for the judge has held that there was here no dishonesty on the part of the defendant or his agent; in other words, he has held that the defendant through his agent did believe that the annuitant had no aggregable estate. The question therefore arises: is that all that these few words import?

Upon that there is some considerable guidance for the court in *Smith* v. *Land and House Property Corporation*,[1] a decision of the Court of Appeal. The contract in that case was one for the sale of an hotel at Walton-on-the-Naze, which at that time, according to what is said in the report, was apparently regarded as being in the last stages of decay. The question which arose there emerged from a reference in the particulars to the effect that the tenant of the hotel was regarded by the vendor as a most desirable tenant. It turned out in fact that those words were singularly inappropriate to him, since he was one who was habitually in arrear with his rent, and the business he was able to do in the decaying town was regarded as quite inadequate to support that or indeed any rent for the hotel. Those are matters of fact, however, peculiar to *Smith's* case.[1] For present purposes the guidance I seek to get is to be found in the language of Bowen L.J., who said[2]: "In considering whether there was a "misrepresentation, I will first deal with the argument that the "particulars only contain a statement of opinion about the "tenant. It is material to observe that it is often fallaciously "assumed that a statement of opinion cannot involve the state-"ment of a fact. In a case where the facts are equally well "known to both parties, what one of them says to the other is "frequently nothing but an expression of opinion. The statement "of such opinion is in a sense a statement of a fact, about the "condition of the man's own mind, but only of an irrelevant "fact, for it is of no consequence what the opinion is. But if "the facts are not equally known to both sides, then a statement "of opinion by the one who knows the facts best involves very "often a statement of a material fact, for he impliedly states "that he knows facts which justify his opinion." It is that last sentence which is particularly pregnant for present purposes.

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[1] (1884) 28 Ch.D. 7.

I observe two things; first that the Lord Justice is not laying down a universal rule. His language is: "a statement of "opinion . . . involves very often a statement of a material "fact." Second, he observes that for that possibility to arise one party must know the facts better than the other. Observe that he is not saying that one party must know all the facts; it suffices for the application of the principle if it appears that between the two parties one is better equipped with information or the means of information than the other.

It is very often said, and truly said, that each case must depend upon its own facts; and I apprehend that the real question for the court is to say, on the basis of the facts and the context of this case, whether this is an instance in which the representation that the vendor has reasonable grounds for his belief ought to be imported. Mr. Lindner argued that to hold, as the judge did, affirmatively on that point was to lay down the principle that wherever it is stated that one party entertains a particular belief then it must follow that there is a representation that he has grounds reasonably supporting his belief. But I lay down no such general proposition. The question here is whether in this case and in the context of these particulars concerning

[1] 28 Ch.D. 7.

[2] Ibid. 15.

lot 11 such a representation of reasonable grounds to support the belief ought to emerge; and, as the judge held, I think that in this case the answer is in the affirmative.

First, it is to be noted that the subject-matter of the sale was a reversion to a sum of consols under a will. Anybody seeking to buy such a property must obviously first consider when the subject-matter is likely to come to hand. The age, therefore, of the annuitant on the determination of whose life the reversion falls in is of vital importance. But I should have thought it of no less importance that the purchaser wants to know how much will be left of the capital fund when duties have been paid at the death of the annuitant. Therefore it is of the utmost importance to a purchaser to know (if he can find out, which he may or may not be able to do) whether the impost of estate duty will be limited to the appropriate rate for the sum of the reversion alone or whether the rate will be affected by the circumstance that the annuitant has other considerable means, disposable capital of his or her own, which for duty purposes will be aggregated with the amount passing, namely, the sum providing the annuity. Therefore the statement " who is believed to have no " aggregable estate " is one obviously and vitally affecting the subject-matter being offered. As the judge pointed out, anybody who has any experience in dealing with properties of this kind must be very much alive to that point.

The next thing to notice, I think, about the particulars is the item at the end: " Solicitors as to lot 11—Messrs. Oscar Mason " & Co."—a well-known firm of solicitors of standing and repute.

What would be the effect of this language upon the mind of a possible purchaser? Clearly, I should have thought, it would flow from the language used and would be intended to be understood by a reader of the particulars that persons who knew the significance of this matter and who were experienced and competent to look into it were expressing a belief founded upon substantial and reasonable grounds. As between the vendor and the prospective purchaser it is quite plain that this is a case within the category stated by Bowen L.J., namely, a case where the vendor's knowledge or means of knowledge is far superior to that of the purchaser. The purchaser can know nothing whatever which could guide him on this point. He does not know the lady's name and he knows nothing about the will except its date. He has, when he reads this, no possible means of knowing whether the annuitant is a woman of means or is not a woman of means. It is, no doubt, possible that a purchaser might find out. I suppose he might communicate with the Public Trustee, just as in *Smith's* case [3] the purchaser might have made inquiries about the desirability of the tenant; but in this case it is far less likely even than in *Smith's* case [3] that, if a purchaser had the time and opportunity of inquiring, he could have found the answer. The Public Trustee would probably have been unable to tell him anything. It is very doubtful whether the will in question could have been successfully identified. On the other hand, by virtue of the bankruptcy, the vendor is the beneficial owner of the reversion. He, therefore, has available to him a considerable amount of fact quite unknown to the purchaser; and available to him obviously also would be means of information and of inquiry. He could inquire of the annuitant or of other persons about the circumstances relevant to this matter of aggregable estate. I observe that this was a sale subject to a reserve price. A purchaser would note that and would obviously assume that the reserve price would have been fixed with due regard to this matter of aggregability.

I am, therefore, entirely of the same opinion as was the judge, that this is a case in which the representation was not merely confined to the fact that the vendor entertained the belief but also, inescapably, there goes with it the further representation that he, being competently advised, had reasonable grounds for supporting that belief.

The judge put the matter thus in his judgment. He first of all observed that, if the purchaser is not entitled to suppose that the vendor is in possession of facts enabling him to express an opinion which is based upon reasonable grounds that would, he thought (and I agree with him) make business dealings, certainly in this class of business, almost impossible. "It must "be remembered," he said, "that in this case the purchaser "going to the auction had no means whatever of finding out "anything about the annuitant's means. When the contract "was signed, the purchaser did not even know the name of the "annuitant. On the other hand the vendor must be expected to "be in possession of facts unavailable to the purchaser and the "purchaser is entitled to suppose that he is in possession of facts "which enable him to express an opinion which is based upon "reasonable grounds. As I have already said, if that is not so, "business relationships become quite impossible. It may be "different where the facts upon which the opinion is expressed "are equally available to both parties. Then the opinion may

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[3] 28 Ch.D. 7.

"be no more than an expression of opinion, but where the "opinion is expressed on facts assumed to be available to the "vendor, which certainly are not available to the purchaser, and "that opinion is expressed to induce the contract, in my judg- "ment the purchaser is entitled to expect that the opinion is "expressed on reasonable grounds." The judge, using that general language in relation to this case, is reflecting the language of Bowen L.J., which he then proceeds to quote in the next paragraph. I am, therefore, satisfied that this relevant language does involve the representation that there were reasonable grounds for the belief, and certainly that was a representation of a most material fact.

The next question, then, is: was that representation true? Upon that, Mr. Lindner has not argued, if he will allow me to say so, with very great strenuousness, and, indeed, I think he would have had difficulty in doing so. The grounds upon which the belief was expressed were set out in summary by the judge in his judgment. [His Lordship referred to the inquiries made by the managing clerk summarized above, commenting that the information that the annuitant spent some part of her time at Nice was somewhat significant and since the amount of the annuity was £200 sterling per annum it might have been thought that that at any rate carried a certain element of caution with it. His Lordship continued:] The question then arises whether that information was such as to justify a reasonable person, who had any awareness of the significance of the matter, asserting as an inducement to a possible purchaser that the annuitant was believed to have no aggregable estate? I think the question has only to be put to be answered. It is quite plain that that very meagre information formed no basis whatever upon which a responsible person could put forward that view as an inducement for somebody to come and buy the reversion.

The inquiry was made, as one would expect, by a representative of the firm of Oscar Mason & Co., whose concern in the matter as solicitors was stated in heavy leaded type in the particulars. The judge was obviously somewhat troubled by the extraordinary fact that any responsible member of a well-established firm of solicitors could possibly have asserted a belief upon such flimsy grounds. That was a consideration which was in his mind when he had to consider on the question of costs the justification of the allegation of fraud, including that of recklessness; but the judge had the advantage of seeing the managing clerk concerned and he was satisfied that the managing clerk, though in this respect, unhappily, quite inept, was none the less honest. He was inept because this subject-matter was far outside the ordinary scope of his professional duties, he being a litigation clerk; and it became quite manifest that he himself had no comprehension at all, when he started dealing with this matter, of the meaning of the words "aggregable estate" and certainly never comprehended at any stage the importance of the alleged belief to a would-be purchaser of a reversion.

At this stage I will consider, shortly, another point raised by Mr. Lindner. From what I have said it will be appreciated that the inquiries were made by, and indeed the whole of the preparation of these particulars was in the hands of, the firm of solicitors whose name I have mentioned. The defendant, the trustee in bankruptcy, very naturally and very properly left the matter to the solicitors to do the work for him. The draft form of particulars sent by the auctioneers was amended by the solicitors and returned to them; and the trustee in bankruptcy naturally and properly relied upon it. But Mr. Lindner put forward the argument that this question of belief and grounds of belief in a context such as this has a subjective quality about it; so that, even if it were wholly unreasonable for the solicitors concerned to have put forward a belief about there being no aggregability, it was quite otherwise in the case of the trustee in bankruptcy, who was said to be an accountant. It was said that it would suffice for the accountant, the vendor, to say: "I made no "inquiries myself. I relied, as I submit I am entitled to do, "on a competent firm of solicitors, and, I having so relied and "they having done this draft for me, I reasonably, accepted it." I am bound to say, after hearing the argument, that I am still, for my part, quite unable to apprehend it at all. The defendant, the trustee in bankruptcy, is the vendor who asserts the belief. He did not give evidence; there was no reason why he should; but the evidence in his case proved that the belief was put forward founded upon inquiries made by the solicitors which produced results quite incapable reasonably of supporting the belief. The defendant accepted and ratified what had been done by his agents, as he was entitled to do; but he must abide by the consequences. All that they put forward he must be treated as having put forward himself.

The extravagance of the argument, if I may so describe it, is revealed by this. I put to Mr. Lindner the suggestion that if his argument was right it would follow that if the solicitors, having made an inquiry, were then informed that the annuitant was in fact possessed of a quarter of a million pounds of her own money but, owing to some mental aberration on their part, the solicitors thought that it did not matter and was not aggregable, still, apparently, the accountant, the trustee in bankruptcy, would be able to say that he reasonably entertained the belief put forward by way of inducement merely because the solicitors asserted it. I think the proposition, so illustrated, has really only to be stated to be rejected.

There remains the third necessary condition essential to the plaintiff's case, namely, that he relied upon the representation which I hold was implicit and was untrue. Upon that, we have not really been troubled with any argument at all. The judge heard the plaintiff and was quite satisfied that the plaintiff did in fact rely upon this representation. That, therefore, is the end of the matter.

Some other subsidiary points were indicated; but, in my judgment, none of them contained any substance. It was said that the implied representation as to grounds of belief was in some sense subsidiary; from which it was sought to say that, once the belief put forward was held to be honest, however incredibly, that was the end of the matter. I can find no basis in authority or good sense for that view, and I reject it.

Another point was made on condition 3 of the conditions of sale. That condition stated, among other things, that "the "vendor accepts no responsibility as to what duties will in fact "become payable nor as to the amount which will become "payable." It was suggested that somehow or other that so qualified the effect of the preceding representation as to make it ineffective for the purposes of this action. I am quite unable to accept that argument. I observe that condition 3, for one thing, repeats the representation, for it says: "The above information "regarding duty so payable is believed to be correct." What condition 3 is concerned with is to say that, whatever be the position today, when this lady dies, which may be 10 or 15 years hence, the vendor is not himself to be responsible at all for or in respect of the payment of any duty. In other words, the condition seems to me to deal with an entirely different point and cannot, in my judgment, in the least qualify the representation which I hold was earlier made as an inducement and, in fact, relied upon by the plaintiff.

[His Lordship then considered the question of costs, a matter which does not call for report, and concluded:] For the reasons which I have given, I think the appeal fails and must be dismissed.

ROMER L.J. I entirely agree with everything my Lord has said. In the course of the passage from Upjohn J.'s judgment which the Master of the Rolls has read, the judge, after pointing out that the statement of belief in the particulars that the annuitant was believed to have no aggregable estate was made with a view to inducing the contract, expressed the view that the plaintiff as purchaser was entitled to expect that the opinion was founded on reasonable grounds. It appears to me that that is the real point in this case, namely, whether the judge was right or whether he was wrong in that view. Mr. Lindner has submitted that he was wrong, but I am abundantly satisfied that he was perfectly right. In the first place, one must remember that the plaintiff knew practically nothing whatever about the subject-matter of this sale, or the title from which it derived, or the circumstances which affected its value. All he knew about it was that which was stated in the particulars, that it was a reversionary interest then represented by a sum of £8,000 consols receivable on the death of a lady aged 69, that the reversion derived under a will dated March 13, 1916, which was proved in December, 1917, and that the trustee of that will was the Public Trustee. That really is all that he knew. Short of writing to the vendor's solicitors, who are named in the particulars, and persuading them to help him in ascertaining further particulars, I cannot see that he was in a position to do anything whatever for himself. It would be of little use even to have written to the Public Trustee, because he could not inform the Public Trustee anything about the will under which this reversion derived except its date and the date of its probate. It might be, such is the efficiency of the Public Trustee's office, that that might be sufficient, after a great deal of research, to discover who the testator was and the terms of the will and everything else; but short of that, as my Lord has pointed out, the purchaser was helpless in this matter. On the other hand, the vendor, who has to be identified for this purpose, as I think, with the bankrupt herself, the owner of the reversion, was in a far stronger position —to put it at its lowest—than was the purchaser to ascertain all relevant facts bearing upon this reversion, and more particularly bearing upon its value and what it was likely to bring in on the death of the annuitant.

That being so, I should have thought that it was fairly obvious that the statement purporting to come, as it did come, from the vendor's solicitors, and expressing a belief vital in relation to this legal transaction, inevitably would suggest to the purchaser that the opinion was being expressed upon reasonable grounds; for it was a matter which everybody concerned, and especially a solicitor, must know would vitally affect the value of the reversion which the purchaser was proposing to buy, in that a matter which obviously affects the value of a reversion more than anything else is whether the value of it will be reduced because of the principle of aggregation when it falls in.

For my part, accordingly, even in the absence of authority, I should have thought, on the facts of this particular case, that it was abundantly clear that the judge was right when he said that the purchaser was entitled to expect that the opinion or belief was expressed upon reasonable grounds, and I should have come to that conclusion if there had been no authority on the matter at all. But, in fact, there is the authority to which the Master of the Rolls and the judge referred, namely, *Smith* v. *Land and House Property Corporation*,[4] and in particular the judgment of Bowen L.J. which, when applied to this particular case (and we are only dealing with the facts of this particular case) supports beyond doubt the conclusion at which the judge arrived and with which I entirely agree.

None of the other points which were addressed to us and relied upon in this appeal appear, if I may respectfully say so, to have very much substance in them; and there is nothing that I can add to what Lord Evershed M.R. has said with regard to them. I entirely agree with the conclusions at which he has arrived. I agree that the appeal should be dismissed.

ORMEROD L.J. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Oscar Mason & Co.; Charles H. Wright & Brown.*

E. D.

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[4] 28 Ch.D. 7.

C. A.

1958
Feb. 28;
Mar. 3, 4, 5, 6, 7;
Apr. 1.

Jenkins, Romer and Ormerod L.JJ.

LOEW'S INCORPORATED *v.* LITTLER AND OTHERS.

[1955 L. No. 1038.]

Copyright — Assignment — Assignment of performing right — Whether transmissible or personal to assignee.

Copyright—Death of author—Assignment before death—Before 1911—*Rights of assignee—Assignment of performing right before Act of* 1911—*Death of authors after* 1911—*Rights of assignee thereafter—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 24 (1).

In 1905 an agreement was made between Leon and Stein, the authors, and Lehar, the composer of a German musical play known as "Die Lustige Witwe," and Felix Bloch Erben, a Berlin firm of dramatic agents. The agreement was in German and was governed by German law; it provided that the firm should have assigned to it the sole rights of distribution of the work in theatres all over the world, of public performance and of translation into foreign languages, subject to the payment of the proceeds less a commission to the authors and composer.

Pursuant to the rights so conferred, Felix Bloch Erben in 1906 entered into an agreement with George Edwardes, a theatrical producer, in the English language and subject to English law, which provided that "the said Felix Bloch Erben agrees to sell and "the said George Edwardes agrees to purchase the sole rights of "production in the English language in Great Britain and Ireland "and the British Colonies and in the United States and Canada of "'Die Lustige Witwe' . . ." There followed provisions for the production of the work in due time; for the payment of weekly royalties; for the payment of advance royalties, to be increased if Edwardes did not produce the work in London or New York by a specified date, and by a further provision: "In the event of the "said George Edwardes failing to adhere to the terms set forward "in this agreement all rights and interests in the said opera in "the country in which it has not been produced within the stipulated period shall then and there revert to the said Felix Bloch "Erben. . . ."

Edwardes, after producing the work with success under the title of "The Merry Widow," died in 1915, and by various assignments such rights as passed on his death became vested in the plaintiffs. The survivor of the two authors died in 1940 and the composer in 1948. At all times until action brought, royalties were paid to and accepted by Felix Bloch Erben, and neither they nor any representatives of the authors and composer challenged the plaintiffs' title. No notice was given pursuant to section 24 (1) of the Copyright Act, 1911.[1]

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[1] Copyright Act, 1911, s. 24: "(1) Where any person is immediately before the commencement of "this Act entitled to any such right "in any work as is specified in the "first column of the First Schedule "to this Act, or to any interest in "such a right, he shall, as from that "date, be entitled to the substituted "right set forth in the second column "of that schedule, or to the same "interest in such a substituted right,

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In 1955, in consequence of a performance of the work in England not authorized by the plaintiffs, they brought an action against the producer and others concerned. The legal representatives of the authors and composer, and Felix Bloch Erben, intervened and were added as defendants, and it was ordered that the question of title should be tried between the plaintiffs and the added defendants. Vaisey J. found that, according to German law, Felix Bloch Erben had no authority to grant to Edwardes rights transmissible on his death, and held that, on the true construction of the agreement of 1906, he received a mere personal interest terminable on his death. On an appeal by the plaintiffs, the Court of Appeal reversed the finding of Vaisey J. on German law; on further points:—

Held, (1) that the agreement of 1906 conferred rights on Edwardes which were transmissible to successors in title.

Messager v. *British Broadcasting Co. Ltd.* [1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L. applied.

(2) That by virtue of section 24 of the Copyright Act, 1911, the plaintiffs had, as to the words until seven years after the death of the surviving author, and as to the music until seven years after the death of the composer, the sole and exclusive rights conferred on Edwardes to perform and license the performance of the work in the English language in Great Britain; and that after these respective dates they had similar but non-exclusive rights.

Decision of Vaisey J. reversed.

Appeal from Vaisey J.

The facts are taken substantially from the judgment of the court.

" and to no other right or interest, " and such substituted right shall " subsist for the term for which it " would have subsisted if this Act " had been in force at the date when " the work was made and the work " had been one entitled to copyright " thereunder: Provided that—(*a*) if " the author of any work in which " any such right as is specified in " the first column of the First " Schedule to this Act subsists at the " commencement of this Act has, be- " fore that date, assigned the right or " granted any interest therein for the " whole term of the right, then at " the date when, but for the passing " of this Act, the right would have " expired the substituted right con- " ferred by this section shall, in the " absence of express agreement, pass " to the author of the work, and any " interest therein created before the " commencement of this Act and then " subsisting shall determine; but the " person who immediately before the " date at which the right would so " have expired was the owner of the " right or interest shall be entitled at " his option either—(i) on giving " such notice as hereinafter men- " tioned, to an assignment of the " right or the grant of a similar " interest therein for the remainder of " the term of the right for such con- " sideration as, failing agreement, " may be determined by arbitration; " or (ii) without any such assignment " or grant, to continue to reproduce " or perform the work in like manner " as theretofore subject to the pay- " ment, if demanded by the author " within three years after the date at " which the right would have so " expired, of such royalties to the " author as, failing agreement, may " be determined by arbitration . . . ; " The notice above referred to must " be given . . . not less than six " months before the date at which the " right would have so expired, . . ."

The question at issue in this appeal was the ownership of the English stage performing rights of a well-known musical play known in this country as "The Merry Widow." The plaintiffs were a company incorporated in the United States of America, and on May 5, 1955, they issued a writ against the defendants, Emile Littler and others, claiming (inter alia) an injunction to restrain the defendants and each of them from infringing the plaintiffs' copyright in the said play. By an order made on May 4, 1956, it was ordered that the claim of the plaintiffs against the defendants Otto Blau, Anna Amalia Hebein, Fritz Stein and Felix Bloch Erben (who had been added as defendants at their own request), and the counterclaim of the first three of the said defendants against the plaintiffs for a declaration (inter alia) that they were the owners of the said copyright, should be tried before the claim of the plaintiffs against the other defendants.

The music of the play was composed by Franz Lehar, and the words were written by Victor Leon and Leo Stein, hereinafter referred to as "the authors." Leo Stein died in 1920 and his interests were now vested in the defendant Fritz Stein. Victor Leon died on February 23, 1940, and his interests were vested in the defendant Anna Amalia Hebein. Franz Lehar died on October 24, 1948, and his interests were vested in the defendant Otto Blau.

The plaintiffs' title to the rights claimed by them depended on the construction of two agreements. The first, dated November 30, 1905, was made between the authors and Felix Bloch Erben, a firm of musical and dramatic agents carrying on business in Berlin. The second, dated February 27, 1906, was made between Felix Bloch Erben and George Edwardes, a well-known English theatrical producer. The place of fulfilment of the 1905 agreement within the meaning of article 29 of the German Code of Civil Procedure was stated in the agreement to be Berlin, and it was agreed between the parties that it must be construed according to German law, but that the 1906 agreement should be construed in accordance with English law. An agreed translation of the 1905 agreement, which was made in the German language, provided by article 1: "Messrs. Lehar, Leon and Stein hand over "the Operetta 'The Merry Widow' in three Acts written and "composed by them respectively to the firm of Felix Bloch Erben "for the sole and exclusive distribution to all theatres in this "country and abroad and transfer to it the rights of public "performance and recital of the said work which rights, as they "hereby affirm, are exclusively vested in them as authors, as well "as the rights of translation into foreign languages in accordance "with articles 11, 12 and following of the German Reich Law "of June 19, 1901, as their legal successor, in such a way that "the firm of Felix Bloch Erben shall solely and exclusively be "entitled during the period of this agreement to exercise the "said rights either by itself or by its agents abroad without any "restriction."

Article 3 provided: "The entire income which may be "obtained by the distribution to theatres of the work mentioned "in section 1 shall be paid by Messrs. Felix Bloch Erben of "Berlin to the authors after deduction of the following distributor commissions, that is to say," and then it went on to set out the various payments and commissions to be made. Article 4 provided for monthly accounts and payments, while by article 5: "The duration of this agreement is fixed so as to "coincide with the duration of the legal rights of protection of "the work mentioned in section 1." Lastly, article 9 provided: "The place of fulfilment for both parties within the meaning of "article 29 of the Code of Civil Procedure will be Berlin."

It was the contention of the plaintiffs that, under this agreement, Felix Bloch Erben was empowered to grant to suitable persons a transmissible right to produce and perform the play in Germany and other countries. The defendants, on the other hand, contended that Felix Bloch Erben had no power under the 1905 agreement to confer on a transferee any right other than the right of performance during the life of the transferee.

By the 1906 agreement Felix Bloch Erben transferred to George Edwardes certain rights for the production and performance of the play in the English language in Great Britain and elsewhere. The relevant paragraphs of the agreement were as follows: "The said Felix Bloch Erben agrees to sell and the "said George Edwardes agrees to purchase the sole rights of production in the English language in Great Britain and Ireland "and the British Colonies and in the United States of America "and Canada of 'Die Lustige Witwe,' comic opera in three Acts "by Victor Leon, Leo Stein and Franz Lehar. (2) The said "George Edwardes agrees to pay to the said Felix Bloch "Erben for performances of the said opera in London the sum "of £35 a week, and for performances of the said opera in New "York an equal sum of £35 a week. (3) The said George "Edwardes agrees to pay to the said Felix Bloch Erben for performances of the said opera in the provinces of the United

"Kingdom and the United States and Canada," certain sums therein stated. "(4) The said George Edwardes further agrees "to pay to the said Felix Bloch Erben for the sole rights of "production in the English language in Great Britain and "Ireland and the British Colonies and in the United States of "America of the opera mentioned in paragraph 1 a sum of £1,000 "on account of above fees, which sum is to be paid to the said "Felix Bloch Erben at the signature of this agreement. (5) The "said George Edwardes agrees to produce the said opera in three "acts and not to make any more alterations or add more songs "and other musical numbers than are necessary to ensure the "success of the said opera on the English speaking stage. "(6) The said George Edwardes agrees to produce or cause to be "produced the said opera in London or New York not later than "May 1, 1907. (7) Should, however, for some reason or other "the said George Edwardes be prevented from producing the said "opera in London or New York on or before May, 1907, the said "Felix Bloch Erben agrees to grant to the said George Edwardes "an extension of term of one year from the said date for the "ultimate date of production of the said opera in London or in "New York upon payment by the said George Edwardes to the "said Felix Bloch Erben of a further sum of £200 on account "of above fees." By clause 10: "In the event of the said "George Edwardes failing to adhere to the terms set forward in "this agreement all rights and interests in the said opera in the "country in which it has not been produced within the stipulated "period shall there and then revert to the said Felix Bloch Erben "who shall not be liable to return to the said George Edwardes "any sums paid by him to them in respect thereof."

George Edwardes caused the play to be translated into English with suitable adaptations, and added certain lyrics, and produced it at Daly's Theatre, London, the first performance taking place on June 8, 1907. The production had a long and successful run, and had since been revived in London and the provinces from time to time. George Edwardes died on October 4, 1915, and after various assignments such rights as existed on his death became vested in the plaintiffs. After the death of George Edwardes his successors continued to pay to Felix Bloch Erben the royalties specified in the 1906 agreement, and the correspondence which was before the court between Felix Bloch Erben and the various successors to George Edwardes, and between the respective solicitors and agents of the parties showed that Felix Bloch Erben and the successors to the authors were aware of (and certainly took no objection to) the assignments which took place after the death of George Edwardes. Further, by agreement dated July 23, 1929, Lehar, Leon, and Fritz Stein as the personal representative of Leo Stein, transferred to Metro-Goldwyn-Mayer Pictures certain rights in relation to the exhibition of motion pictures of the play; and in the warranty clause it was set out that the stage performing rights had been granted to the late George Edwardes; and by an agreement dated March 30, 1930, made between Felix Bloch Erben and Metro-Goldwyn-Mayer, and also relating to the transfer of motion picture rights, the continuing existence of the rights granted to George Edwardes by Felix Bloch Erben was clearly recognized.

The issues were tried before Vaisey J., who, after hearing the evidence of experts in German law, Dr. E. J. Cohn and Dr. F. A. Mann, held that the agreement of 1905 did not empower Felix Bloch Erben to confer transmissible rights on their assignees; and held further that the agreement of 1906 did not confer such rights on Edwardes. The plaintiffs appealed.

Charles Russell Q.C. and *F. E. Skone James* for the plaintiffs (after arguments on German law). The agreement of 1906 conferred a transferable right on George Edwardes, and is indistinguishable in its terms from the agreement sued on in *Messager* v. *British Broadcasting Co. Ltd.*,[2] which was held to operate as an assignment of the sole and exclusive right of representation within the area named. The operative words in clause 1 are " sell " and " purchase," which imply an out-and-out sale. The sale of a sole and exclusive right of performance must prima facie be for the whole life of the copyright, unless modified by other terms in the contract. A plain sale is not consistent with any strictly personal qualifications in the buyer and does not suggest the transfer of a right which is not transferable by him. There is nothing in the document which suggests a licence or any limitation of Edwardes's rights. If there is any uncertainty in the construction, the court may have some regard to the way in which the parties have through the years acted under the agreement: see Halsbury's Laws of England, 3rd ed., vol. 11, p. 410. *Watcham* v. *East Africa Protectorate*[3] shows that this principle applies to a modern as well as to an ancient instrument.

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[2] [1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L.

[3] [1919] A.C. 533; 34 T.L.R. 481.

If, under the agreements of 1905 and 1906, the plaintiffs are entitled to the sole performing rights in this country, there remains to be considered the effect of section 24 (1) of the Copyright Act, 1911. That Act extended the duration of copyright from seven to 50 years after the death of the author, and the purpose of section 24 is to provide for a fair distribution, in cases where there has been an assignment before the Act came into force, between the original author and the assignee during the extended period. In the present case the section takes effect, as regards the words in 1947 and as regards the music in 1955, after the issue of the writ, which was on May 5 of that year. The plaintiffs did not give a notice under option (i), so they rely on option (ii). Before the section took effect the plaintiffs had not for some time been performing the work themselves, but had been licensing others to do so; but the words "in like manner" in the proviso must refer to their legal entitlement, and not to what they may actually have been doing. They are entitled to continue to enjoy the rights granted to Edwardes subject to the payment of the prescribed royalties.

Skone James following. The language of the agreement of 1906 was amply wide enough to confer the rights specified on Edwardes and his successors and assigns. [*Serra* v. *Famous-Lasky Film Service Ltd.*[4] and *British Actors Film Co. Ltd.* v. *Glover*[5] were referred to.] Once there is an agreement which transfers the English copyright to Felix Bloch Erben, German law ceases to affect any assignment of that copyright by them. Further, if there were any restrictions on the powers granted in 1905, that would not affect Edwardes, who was a purchaser for value without notice.

As regards section 24 (1), the second limb of the proviso confers rights on the assignee which, subject to the payment of royalties, are the same as those previously granted. "In like "manner as theretofore" means "with the like rights as there-"tofore," so that an exclusive right remains an exclusive right. The distinction between the two alternatives is not as to the right enjoyed but as to the method by which the author is paid.

Guy Aldous Q.C. and *D. W. Falconer* (*K. E. Shelley Q.C.* with them) for the defendants (after arguments on German law). If the right granted to Edwardes was transmissible, it would mean that the authors would lose all rights of control over the copyright: see *Barker* v. *Stickney*.[6] The agreement of 1906 is in very different and distinguishable terms from that in the *Messager* case.[7] Edwardes is named personally throughout, instead of being referred to as " the licensee "; the whole basis of the agreement was the personal reputation of Edwardes; he alone was to stage the piece. The expression " the said George Edwardes " in certain clauses (such as 6 and 7) must mean him personally, and should be so construed elsewhere. If he had died during the first run of the work, the court might have implied a term or equity (as in *Sweet* v. *Cater*[8]) that his executors might continue that particular run, but no more. [*Griffith* v. *Tower Publishing Co. Ltd. and Moncrieff*[9] was also referred to.] The words " produce or cause to be produced " mean that he must produce by himself, his servants or agents and not by an assignee. [*Karno* v. *Pathé Frères Ltd.*[10] was referred to.]

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[4] [1921] W.N. 347; (on appeal [1922] W.N. 44); [1917–23] Mac. C.C. 272.

[5] [1918] 1 K.B. 299; 34 T.L.R. 162.

It has been suggested that if there is any ambiguity in an agreement, the subsequent conduct of the parties may be looked at to resolve it; but that doctrine must be applied with care: *Gaisberg* v. *Storr*.[11] So long as the authors got their royalties from Felix Bloch Erben, they were not concerned to know what the source was.

As regards the effect of section 24 (1), under the first option the assignee gets the same rights as he had before. The second option is differently worded and has a different effect; the assignee gets the right " to continue to reproduce or perform the work " in like manner as theretofore." There is no right given to authorize the performance by others, which is all that these plaintiffs have been doing. Either they cannot rely on the option at all, or at most they get a non-exclusive right merely to perform by themselves or their agents, not to authorize performance by others; such a right would subsist only for any run of the play in being when the subsection took effect.

Shelley Q.C. following. What Edwardes acquired under the agreement of 1906 was a " production " right. Production comes to an end at the dress rehearsal. Edwardes got the right to perform the play in accordance with that production, so long as the run should last and the production was recognizedly the same. There was no assignment of performing right, nor of any right which could be transferred. The agreement never contemplated that Edwardes could assign his right the day after it was made.

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[6] [1919] 1 K.B. 121.

[7] [1928] 1 K.B. 660.

[8] (1841) 11 Sim. 572.

[9] [1897] 1 Ch. 21; 13 T.L.R. 9.

[10] (1909) 25 T.L.R. 242.

[11] [1949] W.N. 337; 65 T.L.R. 485; [1949] 2 All E.R. 411.

As regards section 24 (1), the provisions affecting the plaintiffs form an exception to an exception and should be narrowly construed.

Russell Q.C. in reply. By clause 1 of the agreement of 1906 Edwardes agreed "to purchase the sole rights of production"; in such a clause one would never find a reference to the executors and assigns of the purchaser. If he dies, his executors step into his shoes not because of any implied term but because the rights purchased form part of his estate. It is quite impracticable and unreasonable to suggest that on his death his executors would merely have a right to continue the run based on the original production; it is impossible to predicate what changes of theatre, or cast, etc., would constitute a change in the production. The rights of production and performance go together; it is absurd to suggest that Edwardes got the performing right by implication only, when that is the right which has the essential commercial value.

As regards section 24 (1), the words "reproduce or perform" must extend to all branches of performing right, including the right to licence, if enjoyed before. The intention is that when the subsection takes effect the grantee shall be entitled to continue to exercise his established rights on terms reasonable to the author. The words "in like manner" must refer to what the grantee had theretofore been entitled to do, not to what he had actually been doing.

Cur. adv. vult.

April 1. JENKINS L.J. The judgment about to be read by Ormerod L.J. is the judgment of the court in this case.

ORMEROD L.J., after stating the facts and reviewing the evidence of two experts in German law, continued: We find that we cannot agree with the conclusions of the judge on this part of the case. As we see it, the duty of the court is to determine from the witnesses the principles of German law which govern the construction of the agreement, and then to apply these principles to decide the nature and extent of the powers granted to Felix Bloch Erben. There is a good deal of common ground in the evidence of the two German lawyers. They were agreed that Felix Bloch Erben could not make an assignment in toto.

They were also agreed that the 1905 agreement created a commission agency which put upon Felix Bloch Erben the duty of exploiting the play by finding suitable persons to produce it in Germany and elsewhere, and of doing what was reasonable to carry out that duty. Dr. Cohn expressed the view that to enter into an agreement which passed to the transferee a transmissible right was reasonable, and indeed that it was carrying out the very purpose of the 1905 agreement. Dr. Mann held the contrary view. The reason why Dr. Mann was of the opinion that it could not be a reasonable exercise of the powers of Felix Bloch Erben to grant a transmissible interest appears from his evidence to have been founded on passages from German textbook writers. We feel bound to say, having considered carefully the translations of the passages which were put in evidence, and the answers of Dr. Mann when he was cross-examined about them, that we could find no sufficient authority or unanimity of view amongst these writers which would justify a construction which appears on the face of it to be contrary to the plain meaning of the words of the document.

It may well be, as Vaisey J. found, that the 1905 agreement is a contract of personal service, but it is agreed that the service which Felix Bloch Erben contracted to render was to exploit the play by finding suitable persons to produce it. It was agreed by both witnesses that George Edwardes was a producer of the highest reputation, so far as plays of this type were concerned, and it is a reasonable inference that Felix Bloch Erben, in seeking a producer in this country, would be anxious to obtain his services. It would be surprising if an impresario of the standing of George Edwardes would be willing to go to the expense of having the play translated and adapted for performance in England, and the further expense of a production at Daly's Theatre, if the right he had acquired was to last only so long as he should live, and not carry with it any right of transmission. In order to obtain production of the play by producers of standing, it would, of course, be necessary to enter into agreements with them, and no doubt, after negotiation, terms would be agreed which satisfied, so far as possible, the wishes of both parties. To enter into such agreements, therefore, seems on the face of it a reasonable way for Felix Bloch Erben to perform their personal service, and, in our judgment, having given careful consideration both to the evidence and the document itself, they were justified in so acting.

It was the view of both the expert witnesses that the subsequent conduct of the parties could be taken into account in ascertaining the intention of a document, although one expert witness said that this would only be so if the meaning of the document was not clear on the face of it. If support was necessary for the conclusion we have come to as to the meaning of the agreement, it could surely be found by applying this principle. The conduct of the authors and their representatives and of Felix Bloch Erben is, in our view, consistent only with the view that in the minds of the parties the powers given in the 1905 agreement to Felix Bloch Erben were not limited as the judge has found, but enabled Felix Bloch Erben, if circumstances so warranted, to transfer rights which were themselves transferable.

The next question is whether Felix Bloch Erben did in fact by the 1906 agreement transfer to George Edwardes a transmissible right, or whether the rights so conferred were personal to George Edwardes, and lapsed on the day of his death, October 4, 1915. The judge, after discussing the various devolutions of what he described as the "paper title" from the late George Edwardes, and the fact that the respondents had been content to accept the assignees from time to time on the footing that there had been a valid succession to the position held by George Edwardes, said: "I hold, however, that on its true "construction the 1906 document did not convey to George "Edwardes anything more than a personal interest terminable "on his death, however much it may have been considered "reasonable and convenient to act on the assumption that "it did."

Mr. Russell argued on behalf of the plaintiffs that the agreement, which contained in clause 1 the words: "The said "Felix Bloch Erben agrees to sell and the said George Edwardes "agrees to purchase the sole rights of production in the English "language" etc., constituted an agreement to assign. The rights were by their nature transferable, and there was nothing in the document expressing a contrary intention. He pointed out that George Edwardes purchased the sole right of performance; that there was no limit in point of time to the agreement; and that the words in the agreement were not mere words of licence to George Edwardes. Therefore, submitted the plaintiffs, there must be a transfer of the copyright so far as it related to this country for the entire period.

The plaintiffs cited in support of their contention *Messager* v. *British Broadcasting Co. Ltd.*[1] This was a case where the plaintiff, André Messager, granted to George Edwardes the sole and exclusive right of representing or performing a play called "Les Petites Michus" in this country. The full terms of the agreement are set out in the report: "The licensors hereby "grant the licensee the sole and exclusive right of representing "or performing the play in the United Kingdom of Great Britain "and Ireland, America, and the British Colonies and Dominions. "(2) The copyright in the music of the play shall remain the "property of the said André Messager, and he shall be at liberty "to use the English lyrics for sale with the music. (3) The play "shall be adapted for the English stage at the expense of the "licensee. (4) The licensee shall in consideration of the rights "hereby granted pay to the licensors the following royalties or "fees," and then are set out the various royalties. "(5) If the "play be not produced in London by the said George Edwardes "within three months from this date, all rights of representation "as aforesaid shall revert to and become again the absolute "property of the licensors. (6) The licensee agrees not to inter- "polate into the score any piece or number not composed by the "said André Messager without the said André Messager's per- "mission, but the said André Messager agrees to furnish and "compose such alterations and additional numbers required for "the English version as the said George Edwardes may reason- "ably require. (7) The said André Messager shall assist at such "rehearsals as may be agreed and shall conduct the orchestra "on the occasion of the first production of the play at Daly's "Theatre aforesaid." Then clause 8 refers to the keeping of proper books of account, and so on.

In May, 1920, George Edwardes's successors assigned to George Edwardes (Daly's Theatre) Ltd. "so far as they lawfully "could" the benefit of the contract. In October, 1926, George Edwardes (Daly's Theatre) Ltd. granted to the British Broadcasting Co. Ltd. the right to give a performance by wireless telegraphy. McCardie J. held that the licence to George Edwardes was personal to himself, and could not be assigned. In the Court of Appeal the decision of McCardie J. was reversed, and in a short judgment Scrutton L.J. said[2]: "That document, properly "construed, conferred rights upon Mr. George Edwardes, which

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[1] [1928] 1 K.B. 660; 44 T.L.R. 247, C.A.; [1929] A.C. 151; 45 T.L.R. 50, H.L.

[2] [1928] 1 K.B. 660, 663.

"were not merely personal to himself but rights which he could "assign." The decision of the Court of Appeal was affirmed by the House of Lords.[3] After discussing the contentions raised by the appellants on the various clauses of the agreement, Lord Hailsham L.C. continues[4]: "But even if I were wrong on this "construction and if the payments to the licensors were limited "to 4 per cent. of the gross receipts of the performances at "theatres, I should still be unable to treat that expression as "limiting or cutting down the plain grant which is contained in "clause 1. That, in my view, plainly operates as an assignment "to Mr. George Edwardes of the sole and exclusive right of "representation within the area named in the clause, and I think "that that view of the clause is strengthened, not only by the "expression in clause 2, which stipulates that the copyright in "the music shall remain the property of M. Messager, but also "by the language of clause 5, which provides that in the event "of non-production within three months 'all rights of representa-"'tion as aforesaid shall revert to and become again the absolute "'property of the licensors.' That seems to me inept language "in which to describe the mere cessation of a licence, and is "much more apt to describe the reversion to the licensors of "rights which had been assigned by clause 1."

The defendants' contention was that the agreement was personal to George Edwardes, and gave him no right to transmit any of the rights acquired under it. It was pointed out that nowhere in the agreement were the words "his successors or "assigns" added to the name of George Edwardes. The defendants particularly relied on clauses 5 and 6 of the agreement in which George Edwardes agreed to produce the play, or cause it to be produced, in London or New York not later than May 1, 1907, and argued that under the agreement George Edwardes, and George Edwardes only, was entitled to produce, and was under a duty to do so. They sought to distinguish *Messager* v. *British Broadcasting Co. Ltd.*[5] mainly by emphasizing that in the 1906 agreement each clause referred to George Edwardes personally, whereas in the agreement in the *Messager* case he was referred to by name only in clause 5 and 6, and in the other clauses was referred to merely as "the licensee." Whether George Edwardes would have been entitled to delegate his duty under the agreement to produce the play within the specified time is a question which does not arise in this case. The fact was that he did produce the play. The question is whether he had under the agreement acquired rights which were intended to subsist for the whole period of the copyright, and could be transmitted if so desired.

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[3] [1929] A.C. 151.

[4] Ibid. 155.

[5] [1929] A.C. 151.

We can find no real distinction between the present case and that of *Messager* v. *British Broadcasting Co. Ltd.*[5] It should be noted that clause 10 of the agreement, which provides that all rights and interest " shall there and then revert " to Felix Bloch Erben, is in very similar terms to clause 5 of the agreement in the *Messager* case, the language of which was held by Lord Hailsham to be inept in which to describe the mere cessation of a licence. In our judgment, the appellants' contention is the right one, videlicet, that the 1906 agreement did confer on George Edwardes a transmissible right.

The remaining question for consideration is the nature of the rights (if any) remaining in the plaintiffs by virtue of the provisions of the Copyright Act, 1911. Prior to the passing of that Act the period during which the copyright existed in a work was the life of the author and seven years after his death. Of the two joint authors of the play, Leon was the second to die. He died on February 23, 1940, and apart from the 1911 Act the copyright in the words would have expired on February 23, 1947. Lehar died on October 24, 1948, and so the copyright in the music would have expired on October 24, 1955. The Copyright Act, 1911, extended the period to 50 years after the death of the author, and therefore the copyright in both music and words is still in existence. Provision was made in the Act for rights acquired before it came into force. [His Lordship read section 24 (1) and continued:]

It was not disputed that in the event of the plaintiffs being held to have a transferable right, this was a case coming within the proviso—that is, a case where an author had, before the commencement of the Act, assigned his right or any interest therein for the whole term of the right. The first option set out in the proviso could not apply, as the plaintiffs had not given notice within the prescribed time. The question, therefore, to be determined is what are the rights remaining in the plaintiffs under the terms of the second option. The submission of the plaintiffs is that the words entitling them " to continue to reproduce or perform the work in like manner as heretofore " mean that they are to be regarded as continuing to have the rights

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[5] [1929] A.C. 151.

C. A.
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Loew's Incorporated v. Littler.

granted to them under the 1906 agreement, and therefore to have for the remainder of the extended term the sole right of the stage production and performance in this country. If the plaintiffs are right in this, it means that under the second option, without giving notice or taking any other steps, they are in the same position as they would have been if they had given the prescribed notice under the first option and obtained an assignment of the rights subject to the payment of royalties which were either agreed, or determined by arbitration. This construction, in our judgment, cannot be right.

The defendants, on the other hand, submit that as the plaintiffs have failed to give the required notice to exercise the first option, their right to continue to reproduce or perform under the second option does not amount to anything more than the continuation for the length of the run of any production which was in being on the date when the copyright would have expired but for the passing of the Act. They submitted, too, that the plaintiffs had, since before the original date of expiry of the copyright, done nothing more than authorize the production of the play. They had not themselves reproduced or performed it, and the words of the option did not carry any right to authorize a performance. This is, in our view, taking too narrow a view of the words of the statute.

The option does not, in our judgment, give the plaintiffs the sole right to produce and perform in this country which they had under the 1906 agreement, but it does, we think, mean that the plaintiffs still have such rights to continue to produce and perform the play as they had originally. This would include the right to authorize others to perform it also; but it may well be that if the plaintiffs have no longer the sole right to produce, this will be of little value to them.

For these reasons we are of the opinion that this appeal should be allowed.

Appeal allowed.
Leave to appeal.

Solicitors: *Wright & Webb; Kenneth Brown, Baker, Baker.*

F. R. D.

In re ANDREWS (INFANTS). SULLIVAN *v.* ANDREWS.

[1958 A. No. 751.]

1958
May 1, 6, 7, 8.

Upjohn J.

Infant—Ward of court—Jurisdiction—Custody order by Divorce Division—Children subsequently made wards of court—Whether conflict of jurisdiction—Principles applicable—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 9.

The custody of two infant children on the dissolution of the marriage of their parents was awarded to the father with access by the mother. When she realized that the father was planning to take the children to New Zealand she had them made wards of court. The father then applied in the Divorce Division for leave to take the children to New Zealand, which was refused on the ground that the children having become wards of court, the jurisdiction of the Chancery Division superseded that of the Divorce Division ([1958] P. 217). When the matter came before the judge in the Chancery Division he refused to grant the father permission to take the children to New Zealand.

Per curiam. The exercise by the judges of the Divorce Division of their statutory powers could not in any way fetter the powers of the Chancery Division exercising the jurisdiction of the Crown as parens patriae over wards of court.

Where an infant was subject to an order of the Divorce Division, and was also a ward of court:—

(1) Where it was made a ward of court before any order of a judge of the Divorce Division, it was universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order would be made by a judge of the Divorce Division with regard to its custody, care or control, but it would be left with the judge dealing with the wardship proceedings.

(2) Where a judge of the Divorce Division made such an order before an infant had become a ward of the court, and the infant was thereafter made a ward of court by the issue of a summons in the Chancery Division, the judge of the Chancery Division before whom the matter was brought, exercising that comity mentioned, would normally refuse to consider an application on its merits, but would leave it to the judge of the Divorce Division, and, to avoid any difficulty of jurisdiction, would de-ward the infant under the powers conferred by the Law Reform (Miscellaneous Provisions) Act, 1949.[1] That, however, did not apply where the order of the

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[1] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject "to the provisions of this section, no "infant shall be made a ward of "court except by virtue of an order "to that effect made by the court. "(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed by "rules of court unless within that "period an order has been made in "accordance with the application. "(3) The court may, either upon an "application in that behalf or without such an application, order that "any infant who is for the time "being a ward of court shall cease to "be a ward of court."

judge of the Divorce Division was made without any determination on the merits; for example, where an order for custody followed almost as a matter of course in an undefended divorce petition, or where, as in this case, the order was made by consent.

(3) Even where there had been an earlier investigation into the merits by a Divorce judge it might become necessary for the Chancery judge, in the exercise of his undoubted discretion, to entertain applications relating to infants who had been the subject-matter of orders as to custody, care and control in the Divorce Division, at any rate where there had been a change of circumstances since the order of the Divorce Division, or some wholly new question arose.

ORIGINATING SUMMONS under the Law Reform (Miscellaneous Provisions) Act, 1949.

This summons, which was heard in camera, was adjourned into open court for judgment on the question of the respective jurisdictions of the Divorce and Chancery Divisions in respect of the custody of infants.

Two infant children, whose custody was awarded to their father on the dissolution of his marriage with their mother, were subsequently made wards of court by the mother, who feared that their father was intending to take them to New Zealand. The father's application for permission to take them to New Zealand was refused by Wrangham J. on April 30, 1958,[2] on the ground that the infants having been made wards of court some nine days previously the jurisdiction of the Chancery Division superseded that of the Divorce Division. An appeal from the decision of Wrangham J. was adjourned by the Court of Appeal on May 5, 1958,[3] pending the hearing of this summons before Upjohn J.

Sir Frank Soskice Q.C. and *C. D. Ellison Rich* for the mother.
R. W. Goff Q.C. and *John Mills* for the father.

No cases were cited on and no argument was directed to the question of jurisdiction.

UPJOHN J. I have just delivered in camera judgment in this case, but having regard to the course which the case has taken in another division of this court and in the Court of Appeal, I think it proper to make a few observations upon it in open court.

I must mention a few essential facts. The parties were married in 1944. There were two daughters of the marriage, Deirdre, now nearly 11, and Carolyne, just over six. The mother left the father for another man, one Sullivan, in 1956, and the father began divorce proceedings against his wife, the mother, in December, 1956, on the ground of his wife's adultery. That came on for hearing before Mr. Commissioner Bush James on October 25, 1957, being undefended except as to custody and damages to be paid by the co-respondent, Sullivan. The commissioner made a decree nisi, and, by consent, ordered that the custody of the infant daughters should be the father's until further order. The order provided for access by the mother on every alternate Sunday and contained the usual prohibition against removing the infants out of the jurisdiction of the court.

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[2] [1958] P. 217.

[3] *The Times*, May 6, 1958.

The mother married the co-respondent in April of this year. On April 15 the mother, for the reasons with which I have dealt fully in the judgment I have delivered, and being a shrewd woman, became suspicious that the father was about to remove the children from the jurisdiction without the leave of the court. On that day she issued an originating summons in the Chancery Division which made the infants wards of court. Her suspicions were fully justified. The husband had long planned a voyage with his children to New Zealand, and I have but little doubt that if it had not been for his wife's astuteness he would have disappeared with the children without a trace. However, the issue of the originating summons put an end to that. His solicitors had not previously been consulted, and, of course, when they became aware of their client's intentions they drew his attention, very properly, to the fact that it would be necessary for him to obtain the leave of the Divorce Division to take them out of the jurisdiction, and on April 22 they began proceedings for that purpose.

I may say (and I propose to say no more about the facts) that having been into the merits, the husband's application to take the children out of the jurisdiction permanently and take them to New Zealand was not, in my opinion, a proper application at all. For example, he swore that he had a salaried position to go to. In fact he had no such thing. That circumstance, however, formed by no means the only ground for reaching my decision. However, the divorce summons came before Wrangham J. on April 30, who decided that as the children had become wards of court he had no jurisdiction to entertain an application. That same day an appeal from that decision was brought before the Court of Appeal,[1] who gave leave to advance the hearing having regard to the obvious urgency of the matter. The next day the husband's advisers applied to the Chancery master dealing with the Chancery summons which had been issued by the mother, and applied to de-ward the infants in pursuance of the powers conferred by section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, in order that the Divorce Division might consider the husband's application unfettered. That application was adjourned and came before me on May 6. I have since heard the matter for nearly three days. I have read a large number of affidavits and heard a great deal of cross-examination, with the result that the order which I have made is that the father's application is refused and the children remain wards of court.

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[1] *The Times*, May 1, 1958.

I think that it is desirable to state why I have taken this course, for at first sight there might appear to be some conflict of jurisdiction, or at any rate some competition of jurisdiction, in the question of the custody, care and control of infants between the two divisions of this court. In my opinion, however, there is no such conflict or competition. The decision by Wrangham J. is under appeal, and it would be impertinent of me to express any views upon it. In any event, I am not exercising any jurisdiction conferred upon the judges of the Divorce Division with which alone his judgment was concerned.

One thing is clear: that an exercise by the judges of the Divorce Division of their statutory powers cannot in any way fetter the powers of the Chancery Division exercising the jurisdiction of the Crown as parens patriae over wards of court. That, however, does not conclude the matter, for the judges of both divisions are judges of the High Court, and by a natural comity of judges of that court no judge desires to trespass or even appear to trespass upon a matter of which another judge is rightly and proper seized in the exercise of his jurisdiction. This seems to me an appropriate time to state, as I understand it, the principles upon which the judges of the High Court habitually act in this delicate and often overlapping jurisdiction with regard to the custody, care and control of infants who are subject to an order of the Divorce Division and who are also wards of court.

First, where an infant is made a ward of court before any order of a judge of the Divorce Division, it is, I think, universally accepted, probably as a matter of law, but certainly as a matter of comity between judges, that no order will be made by a judge of the Divorce Division, but it will be left with the judge dealing with the wardship proceedings, for the reason that, unlike judges of the Divorce Division, a judge of this division nearly always retains each infancy matter that comes before him under his own particular and personal control.

Secondly, where a judge of the Divorce Division makes an order as to custody, care or control before an infant has become a ward of court and the infant is thereafter made a ward of court by the issue of a summons for that purpose in the Chancery Division, the judge of the Chancery Division before whom the matter is brought, exercising that comity I have mentioned, will normally refuse to consider an application on its merits, but will leave it to the judge of the Divorce Division, and, to avoid any difficulty of jurisdiction in that division, will de-ward the infant under the powers conferred by the Act of 1949. That, however, does not apply where the order of the judge of the Divorce Division is made without any determination on the merits; for example, where an order for custody follows almost as a matter of course in an undefended divorce petition, or where, as in this case, the order is made by consent. In such cases comity between the judges does not seem to demand such respect as will preclude investigation of the merits by a judge of the Chancery Division where there has been none by the Divorce judge.

Thirdly, even where there has been an earlier investigation into the merits by a Divorce judge, it may become necessary for the Chancery judge, in exercise of his undoubted discretion, to entertain applications relating to infants who have been the subject-matter of orders as to custody, care and control in the Divorce Division, at any rate where there has been a change of circumstances since the order of the Divorce Division, or some wholly new question arises.

It is impossible to attempt any classification of such cases, but I may usefully give one or two examples. As Wrangham J. fully recognized in his judgment last week, the jurisdiction of the Chancery Division over wards is, in certain circumstances, fuller and more complete, and it may be essential in the interests of the infants that, notwithstanding the order of the Divorce Division, even after a hearing on the merits, wardship jurisdiction should be exercised. This very case provides a striking example. I have already stated that the wife was fully justified in thinking that her husband was going secretly to remove the children from the jurisdiction. By making them wards in Chancery and informing the Home Office, as her advisers did, automatically no air or sea port will permit them to depart.

At my request counsel have made inquiry as to the procedure available on the making of a decree and order for custody in the

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Upjohn J.

Divorce Division. I understand that no such automatic prohibition against departure is available, although possibly, after application, orders can be obtained, or protection can be obtained, in certain cases. But in the meantime valuable hours, or even days, may have been lost. That is one example where it seems to me that this Division must step in. The wife in this case was abundantly justified in issuing her summons, and, being so justified, it must necessarily become the duty of the judge of the Chancery Division to inquire into the merits, even had there been some earlier investigation into questions of custody, care and control by a judge of the Divorce Division.

Another example is where questions of education arise. That is sometimes more conveniently dealt with in this division than in the Divorce Division, and where a judge of this division is once seized of the matter, it is sometimes better, although it is a matter of discretion in each case, for him to retain control over the matter, notwithstanding some earlier order of the Divorce Division.

A further example is where some direction is required regarding the property of an infant.

This seems an appropriate occasion on which to make these remarks as to the exercise of this delicate jurisdiction for the guidance of the profession.

Order accordingly.

Solicitors: *Wegg-Prosser & Co.; Boxall & Boxall.*

I. G. R. M.

1958
Feb. 28.

Danckwerts J.

HOLMES AND ANOTHER *v.* KEYES AND OTHERS.

Company—Meeting—Vote—Date of vote—Poll taken on resolution for election and completed—Votes counted and result declared on following day—Whether director elected on day of poll or when result declared—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 182.

On December 23, 1957, at a general meeting of the G. Co. a poll was taken on resolutions for the election of the defendants to be directors. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers informed the company that the defendants had been elected. The company's articles required that the qualification of a director should be the holding of 500 shares in the capital of the company and that, in accordance with section 182 of the Companies Act, 1948,[1] he should obtain that qualification within two months after his appointment. The articles further provided that a transferor of shares should be deemed to remain the holder of shares until the name of the transferee was entered in the company's register. The defendants' names were not entered in the company's register as holders of the requisite number of qualification shares until the afternoon of February 24, 1958.

On a motion to restrain the defendants from acting as directors of the company, the plaintiffs contended that the defendants were elected on December 23, 1957; that, therefore, the period within which they must obtain their qualification began to run at midnight on December 23/24, 1957; and that the entry of the defendants' names in the register on February 24, 1958, was too late:—

Held, that the elections of the defendants took place on December 23, when the poll was complete except for the declaration of the result, and on no other day, and the period within which they were required to obtain their qualifications began at midnight on December 23/24, 1957, and expired at midnight, February 23/24, 1958. Therefore, the registration of the defendants' names on February 24 was too late.

MOTION.

By this motion in the action, the plaintiffs, William Arthur Holmes and Zena Daniels, on behalf of themselves and all other shareholders in the Gordon Hotels Ltd., sought an interlocutory injunction restraining the first two defendants, Lord Keyes and Fredman Ashe Lincoln from acting as directors of the company, the third defendant.

On December 23, 1957, at a general meeting of the company, resolutions for the election of the defendants to be directors were presented and, in accordance with a previous demand, a poll was taken on the resolutions. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers communicated the result, namely, that the defendants had been elected, to the company. The defendants were not told of the result until about

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[1] Companies Act, 1948, s. 182: "(1) Without prejudice to the restrictions imposed by the last foregoing "section, it shall be the duty of "every director who is by the articles "of the company required to hold a "specified share qualification, and "who is not already qualified, to "obtain his qualification within two "months after his appointment, or "such shorter time as may be fixed "by the articles. . . . (3) The office "of director of a company shall be "vacated if the director does not "within two months from the date of "his appointment, or within such "shorter time as may be fixed by the "articles, obtain his qualification, or "if after the expiration of the said "period or shorter time he ceases at "any time to hold his qualification."

December 27. Article 23 of the company's articles of association provided that ". . . the transferor shall be deemed to "remain the holder of the share until the name of the transferee "is entered in the register." Article 83 provided: "The qualification of a director other than a nominated director shall be "the holding in his own right of 500 ordinary shares of the "company of £1 each and section 141 of the Act [the Companies "Act, 1929] shall be duly complied with by every director "requiring such qualification." Section 141 of the Companies Act, 1929, was in terms similar to those of section 182 of the Companies Act, 1948. No steps were taken by the defendants to acquire the necessary qualification until about January 31, 1958, when the requisite number of shares were purchased by brokers on behalf of each of them. The completion of the purchases was delayed, however, until February, 1958, and the defendants' names were not entered in the company's register as holders of the shares until the afternoon of February 24, 1958.

The plaintiffs contended that the defendants were elected to be directors on December 23, 1957; that the period of two months in which they were required to obtain their qualifications began to run at midnight on December 23/24, 1957, and expired at midnight on February 23/24, 1958, and that the entry of the defendants' names in the company's register on the afternoon of February 24, 1958, was too late. The defendants contended that they were not appointed until December 24, 1957, and the period, therefore, did not begin to run until midnight on December 24/25, 1957.

Charles Russell Q.C. and *Paul Sieghart* for the plaintiffs. The election of the defendants took place on December 23, 1957, on the day that the poll was completed, and it makes no difference when the result was communicated to the company. The period within which the defendants had to obtain their qualification expired, therefore, at latest at midnight on February 23/24, 1958, and, therefore, their registration as holders of the shares on the afternoon of February 24, 1958, was too late. It is plain that the only meeting was on December 23, 1957, when the poll was taken. If there is a case where something must be done, it is the practice of the law to exclude the day of the event from the calculation of the time limited; starting at midnight on the day of the event one gets the period within which one must do the thing. Under the articles directors must take up their qualification shares within a two months' period from the date of their election. The articles also make it plain that when the poll is taken the result is deemed to be the resolution of the meeting at which the poll was demanded. Therefore the election of the two defendants took place on December 23, 1957, which is the only relevant date. It cannot be argued that they fulfil the requirements of section 182 of the Companies Act, 1948, when their names are not on the register of the company at the requisite date as holders of the necessary number of the shares.

R. W. Goff Q.C. and *T. D. D. Divine* for the first two defendants. It is conceded that in calculating the two months one must exclude the first day and include the last day. Therefore, if the relevant day is the 23rd, the defendants were registered out of time. The relevant day, however, is December 24, when the votes were counted and the result declared. Apart from authority, and as a matter of common sense, the appointment cannot have been earlier than the declaration of the result of the poll. In section 182 (1) and (3) the word used is "appointment." Article 98 (c) says "election" or "appointment," but the same arguments apply to either word. Until the votes are counted and the result declared a candidate without qualification cannot be expected to take steps to acquire it. He would take such steps at his peril. Time should only run from the time when the appointment is officially known. "Appointment" must mean the time when the appointment is known to the appointor. The fact that the appointee had not been told of the result would not prevent time running. If an appointee was not a member of the company he would not be entitled to be present at a meeting. The appointee could not act until the votes had been counted and the appointment declared. The word "appointment" connotes that the appointee can serve in that office. If he cannot serve in that office, then he is not appointed. In this case the appointment was made on the 24th by a meeting held on the 23rd.

Then there is the question of the casting vote: the poll is not closed and final when the votes are handed in. The poll does not finish until the votes are counted and the result declared, because in the case of a tie the chairman would be able to exercise his casting vote.

The question is, when was the appointment complete? It was not, as the plaintiffs contend, on the date when the meeting which resulted in the appointment was held. There is nothing in principle to compel one to the conclusion that the appointment must have been made on the 23rd because the meeting was on that day. The appointment was authorized on that day and the

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machinery set in motion which resulted in an appointment, but there was no appointment until the votes were counted and the return made to the chairman. A meeting notionally continues until the poll is closed. [Reference was made to *Shaw* v. *Tati Concessions Ltd.*,[2] *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*[3] and *Jackson* v. *Hamlyn.*[4]] The appointment was made on the 24th, when the poll was closed—that was the first time the appointor knew what its will was. In common sense it is impossible for the company to say "We do not know yet who "the directors are" but at the same time to say "Lord Keyes "and Mr. Ashe Lincoln are directors."

Although the qualification for a director is to hold shares, the defendants satisfied it by having a right in equity to the shares. They became beneficially entitled to the shares in equity at a date earlier than February 23/24, 1958. *Spencer* v. *Kennedy*[5] is distinguishable.

Denys Buckley for the defendant company.

Charles Russell Q.C. in reply. The common sense view is that the appointment was on the 23rd, and is reflected in the fact that the defendants received fees and expenses for periods including that date.

DANCKWERTS J. The question raised by this motion is the validity of the appointment and the qualifications of the first and second defendants in the action who claim to be directors of Gordon Hotels Ltd. [His Lordship stated the facts, read section 182 of the Companies Act, 1948, and continued:] The relevant articles of the company, taking them in order, are these. Article 23: "The instrument of transfer of a share shall be signed "both by the transferor and the transferee, and the transferor "shall be deemed to remain the holder of the share until the "name of the transferee is entered in the register of members "in respect thereof." Article 66 provides that if a poll be demanded in the manner mentioned in the preceding paragraph "it shall be taken at such time and place and in such manner as "the chairman shall direct, and the result of the poll shall be "deemed to be the resolution of the meeting at which the poll "was demanded. The demand for a poll may be withdrawn." Article 68: "In the case of an equality of votes, either on a show "of hands or at a poll, the chairman of the meeting shall be

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[2] [1913] 1 Ch. 292; 29 T.L.R. 261.

[3] [1926] W.N. 78.

[4] [1953] Ch. 577; [1953] 1 All E.R. 887.

[5] [1926] Ch. 125.

"entitled to a further or casting vote, in addition to the votes to "which he may be entitled as a member." Article 81 provides: "The directors may from time to time appoint any other person "to be a director, either to fill a casual vacancy or by way of "addition to the board, but so that the maximum number fixed "as above shall not be thereby exceeded." Then follows provision as to how he shall hold office. Article 83 is to be found in a substituted article contained in a resolution passed on July 29, 1947, and is as follows: "The qualification of a director other "than a nominated director shall be the holding in his own right "of 500 ordinary shares of the company of £1 each and section "141 of the Act shall be duly complied with by every director "requiring such qualification." "Section 141 of the Act" is a reference to section 141 of the Companies Act, 1929, and it is a similar section to section 182 of the Act of 1948. Article 98 provides: "The office of a director shall be vacated . . . (c) If he "ceases to hold the number of shares required to qualify him for "office or does not acquire the same within two months after "election or appointment." It may be that in that article a distinction was being drawn between an appointment of a director, made for the purposes mentioned in article 81, by the board of directors and an election by the company at a general meeting.

The case put forward on behalf of the plaintiffs by Mr. Russell is simple. It is said that the election by the company of these two defendants to be directors took place on December 23, 1957, and that, therefore, the period within which they had to obtain that qualification expired at the latest at midnight on February 23/24, 1958, and, therefore, their registration as holders of shares on the afternoon of the 24th was too late. On the other hand, it is said on behalf of the defendants that the election took place on December 24, and, therefore, the registration on February 24 was not too late.

One point raised by Mr. Goff, on behalf of the defendants, I will mention at once as it seems to me to be quite untenable on the form of the articles. There is no doubt that the two defendants became beneficially entitled in equity to the requisite number of shares in this company at a date earlier than February 23/24, 1958; but it is plain that the qualification must relate back to what is said in article 83, that is to say, that they must *hold* the shares; and there is the provision in article 23 that the previous holder remains the holder of the shares (in effect) until the person who acquires the shares from him is placed on the register of the company. There cannot be two holders of the same shares at the same moment, and, therefore, it is plain that it means "holding" in the sense of completion of the legal title to the shares by the entry of the person in question as the holder of the shares on the company's register, and he does not become the holder until he is so registered. That seems to me to be in accordance with the decision of Astbury J. in *Spencer* v. *Kennedy*,[1] which is binding upon me, and which accords with my own view of the matter.

The other points taken by Mr. Goff, and argued by him with great ingenuity and persistence, do present much more difficulty. He points out that the result of the poll was not known, either to the company or to anybody else, until some time on December 24, 1957, that it is in accordance with common sense that the period in which the persons had to obtain a qualification did not start to run until the result was known, and that it would be unfair if time was running before anybody knew the result of the poll. He added that the company could not be said to have elected anybody before the company itself knew what was the result of the election. So far as the argument on the question of time running is concerned, it does not seem to me to be of much weight, because there is a period mentioned in section 182 of the Act; and the argument in regard to the persons who have to acquire the shares would be equally forceful having regard to the fact that they did not actually know of their election till December 27, 1957, and it is quite impossible to contend that the time did not start to run until then. The point really is: when did the election take place? There was only one meeting on December 23, 1957, and at the conclusion of the operations on that day the chairman closed the meeting, the business was determined, and the meeting came to an end. The poll had been taken by all the votes being cast and no further votes could have been received on the 24th, though, as Mr. Goff points out with some force, if there had been a tie upon the votes taken on the poll the chairman would have been able to exercise his casting vote. Therefore, Mr. Goff says, the poll cannot be considered to be complete until it has been ascertained whether the chairman's vote is necessary or not and the result has been declared. Mr. Goff has referred me to three cases which contain observations which seem at first sight to support him in the conclusion which he seeks to draw. These are *Shaw* v. *Tati Concessions Ltd.*[2]; see the observations of Swinfen-Eady J.[3]; *Spiller* v. *Mayo*

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[1] [1926] Ch. 125.

[2] [1913] 1 Ch. 292; 29 T.L.R. 261.

[3] [1913] 1 Ch. 292, 297.

(*Rhodesia*) *Development Co.* (*1908*) *Ltd.*[4]; and *Jackson* v. *Hamlyn*,[5] which was a case concerning the affairs of this same somewhat stormy company. Those cases, however, were on different sets of circumstances. In the first two cases a poll had been postponed to be taken at a later date than the date of the original meeting; and in the last case the question was simply one of an adjournment; there was a motion on whether a meeting should be adjourned or not, and a poll was demanded. On a poll being taken the motion to adjourn was defeated, but this was not made known till two days after the meeting. It had been announced at the meeting that if the poll was not in favour of an adjournment another meeting would be held. Upjohn J. held that the second meeting was a continuation of the meeting which had begun on the day on which the first meeting was held. It seems to me, therefore, in those cases, that having regard to the expressions used by the judges, and in particular to the observations of Russell J. in the *Spiller* case,[6] the poll remained incomplete, or something of that sort, until the result of the poll was declared.

In the present case the meeting was called on December 23 and was on no other day. It is true that the result was not ascertained till the next day, but the meeting was complete and the poll was complete, except for the declaration of the result, on December 23; and the elections of the defendants, if they were valid, took place on that day and on no other day. Consequently, time did start to run from midnight at the end of that day, December 23, and, therefore, expired at midnight on February 23, 1958; and the registration of the defendants' shares in their names on February 24 was too late.

Injunction granted until judgment or valid election or appointment of defendants as directors or further order.

Solicitors: *Basil Greenby & Co.; Alistair Thomson; A. Kramer & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

P. P.

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[4] [1926] W.N. 78.

[5] [1953] Ch. 577; [1953] 1 All E.R. 887.

[6] [1926] W.N. 78, 79.

C. A.

OUGHTRED v. INLAND REVENUE COMMISSIONERS.

1958
April 1, 2,
3, 4;
May 15.

Lord Evershed M.R.,
Morris and
Ormerod L.JJ.

Revenue—Stamp duty—Conveyance or transfer on sale—Oral agreement for sale of reversionary interest to tenant for life—Subsequent deed of transfer—Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*), (2)—*Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, a mother was the tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son was absolutely entitled to the shares subject to her life interest. By an oral agreement made on June 18, 1956, it was agreed between mother and son that the son, on June 26, would exchange his interest under the settlement and subsequent deeds for certain shares then owned by the mother in the same company to the intent that her life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the mother, son and the trustees, the mother and son gave release to the trustees. The release recited the oral agreement and that the trust fund, consisting of the shares, "is accordingly now held in trust for [the mother] absolutely," and that it was intended to transfer them to the mother, such transfer being the consideration for the release. On the same day, by a deed made between the mother, son and the trustees, the trust fund of 100,000 preference shares and 100,000 ordinary shares was transferred to the mother in consideration of ten shillings.

Upjohn J. held, reversing the commissioners, that the transfer was not assessable to ad valorem duty:—

Held, (1) that in the absence of any finding of fact as to the order in which the deed of release and the two transfers of June 26, 1956, were executed, they should be regarded as having been executed contemporaneously.

(2) That while stamp duty was leviable upon instruments and not upon transactions, the court was not debarred from inquiring what was the true nature and intended purpose of the instrument sought to be charged, and that having regard to the recitals in the deed of release, which was contemporaneous with the transfer, the proper conclusion was that the transfer constituted (as it was intended and contemplated that it should) the completion of the oral bargain made eight days before, and so constituted the conveyance upon and the implementation of the contract for sale of June 18 and, accordingly, the transfer was liable to ad valorem duty as a "conveyance or transfer on sale" within the meaning of section 54 and the First Schedule to the Stamp Act, 1891.

Attorney-General v. *Brown* (1849) 3 Exch. 662 considered.

The application of section 53 (2) of the Law of Property Act, 1925, to the transactions of June 18 and June 26, 1956, by Upjohn J. not approved.

Decision of Upjohn J. [1958] Ch. 383; [1958] 1 All E.R. 252 reversed.

APPEAL from a decision of Upjohn J.[1]

Mrs. Phyllis Brown Oughtred (hereinafter called "Mrs. "Oughtred") appealed by way of case stated under section 13 of the Stamp Act, 1891, from an assessment of ad valorem stamp duty on a deed of transfer dated June 26, 1956, whereby four transferors were expressed to transfer 100,000 preference shares and 100,000 ordinary shares of 10s. each to Mrs. Oughtred in consideration of 10s.

The case stated, so far as relevant, provided: The transferors were the trustees of a settlement (hereinafter called "the settlement") dated January 1, 1924, and made between George Jackson Bentham, of the one part, and William Edward Cooper, Norman Oughtred, John Alwyn Oughtred, Mrs. Oughtred and Doris Strachan Oughtred, of the other part, whereby certain shares in William Jackson & Son Ltd. were settled upon trust for Mrs. Oughtred during her life, and after her death for such of her issue as she should by deed or will appoint, and, subject to any such appointment, for her children who attained the age of 21 years, and if more than one in equal shares and, subject thereto, for Mrs. Oughtred. At all material times the property subject to the trusts of the settlement consisted of 100,000 ordinary shares and 100,000 preference shares in William Jackson & Son Ltd., which prior to the transfer to Mrs. Oughtred were held by the transferors. Mrs. Oughtred was married once only and had one child, Peter Bentham Oughtred (hereinafter called "Peter"), who was living and of age on the date of the transfer to Mrs. Oughtred. By a deed of appointment dated June 18, 1956, and made by Mrs. Oughtred, the trust fund, subject to the trusts of the settlement, was appointed to Peter absolutely, subject to the life interest of Mrs. Oughtred and to the power of revocation reserved in the deed of appointment. By a deed of release dated June 18, 1956, Mrs. Oughtred released her power of revocation. By an oral agreement of June 18, 1956, made between Mrs. Oughtred and Peter it was agreed that Peter would on June 26, 1956, exchange his interest under the settlement and deed of appointment and deed of release for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in the capital of William Jackson & Son Ltd., then owned by Mrs. Oughtred, to the intent that her life interest in the trust fund should be enlarged into absolute ownership.

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[1] [1958] Ch. 383; [1958] 1 All E.R. 252.

By a deed of release made on June 26, 1956, between Mrs. Oughtred of the first part, Peter of the second part, and the trustees of the settlement of the third part, after reciting (inter alia) the oral agreement, that the trust fund consisting of the 100,000 preference shares and 100,000 ordinary shares was "accordingly now held by the trustees in trust for" Mrs. Oughtred absolutely, that it was intended that the shares should forthwith be transferred to her or as she should direct and that Mrs. Oughtred and Peter, being satisfied with all matters and things relating to the execution of the trusts of the said settlement, had agreed to make the release thereinafter contained, Mrs. Oughtred and Peter released and discharged the transferors from all actions, proceedings, claims and demands in respect of the execution of the said settlement. By the transfer to Mrs. Oughtred the transferors transferred to her the 100,000 ordinary shares and 100,000 preference shares, and on the same date she, by the direction of her son Peter, transferred to Donald Miller Jones and Noel Oughtred Till 28,510 first preference shares of 10s. each and 44,190 ordinary shares of 10s. each in William Jackson & Son Ltd. Donald Miller Jones and Noel Oughtred Till were trustees of a trust deed dated June 26, 1956, to which they and Peter were parties, and according to the trusts declared by that deed held the 28,510 preference shares and 44,190 ordinary shares as trustees or nominees for Peter.

The deed of release dated June 26, 1956, and made between Mrs. Oughtred of the first part, Peter of the second part, and the transferors of the third part; the transfer of 28,510 first preference shares and 44,190 ordinary shares of William Jackson & Son, Ltd.; and the trust deed dated June 26, 1956, were presented for adjudication with the transfer to Mrs. Oughtred and the duty on each of them was assessed at 10s.

In paragraph 12 of the case stated the commissioners stated that they were of the opinion that the oral agreement made on June 18, 1956, between Mrs. Oughtred and her son Peter was, for the purposes of the Stamp Act, 1891, and particularly of section 55 thereof, an agreement for sale by Peter to Mrs. Oughtred of his equitable reversionary interest in the property comprised in the settlement of January 1, 1924 (namely, the 100,000 ordinary and 100,000 preference shares), in consideration of the 28,510 preference and 44,190 ordinary shares. The commissioners were further of opinion that, having regard

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to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925, the recital in the deed of release of June 26, 1956, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was " accordingly " now held by the trustees in trust for " Mrs. Oughtred absolutely was incorrect. Except for the transfer to Mrs. Oughtred, no instrument in writing stamped with ad valorem duty transferring to her Peter's equitable reversionary interest was produced to the commissioners. The commissioners were of the opinion that the transfer to Mrs. Oughtred of the 100,000 preference shares and 100,000 ordinary shares was an instrument whereby the equitable interest of Peter in such shares was upon the sale thereof to her transferred to or vested in her and was accordingly a conveyance on sale of such equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of the transfer by Mrs. Oughtred of the 28,510 preference shares and 44,190 ordinary shares. The commissioners were also of opinion that the transfer was also a transfer not on sale to Mrs. Oughtred of the legal interest in the 100,000 preference shares and 100,000 ordinary shares.

The commissioners accordingly assessed the duty under the provisions of sections 1, 4 and 55 of the Stamp Act, 1891, and the heads of charge " Conveyance or Transfer on sale " and " Conveyance or Transfer of any kind not hereinbefore described " in the First Schedule to that Act and other relevant statutory provisions as follows:

Ad valorem transfer on sale duty on £33,140 ...	£663	0	0
and the fixed duty		10	0
Total duty on the transfer to Mrs. Oughtred ...	£663	10	0

No objection was made by Mrs. Oughtred to the assessment of 10s. duty on the transfer to her, but she contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer, and that it was liable to the duty of 10s. only under the head of charge " Conveyance or Transfer of any kind " not hereinbefore described " in the First Schedule to the Stamp Act, 1891, and, being dissatisfied with the assessment made and having paid the duty in accordance therewith, Mrs. Oughtred appealed against the assessment to the High Court.

The questions for the opinion of the court were: (i) whether the transfer to Mrs. Oughtred was liable to duty as assessed by the commissioners; (ii) if not, to what duty it was liable.

Upjohn J. held that the transfer was not a conveyance on sale within section 54 of the Stamp Act, 1891.

The Crown appealed.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. The Crown's contention is that the transfer to Mrs. Oughtred was a transfer on sale. The deed of release did not alter the nature of the transfer. The charging section is section 54 of the Stamp Act, 1891. The transfer was a transfer on sale of Peter's equitable interest and was liable to ad valorem duty on the consideration for that sale. It was further chargeable with a 10s. stamp in respect of the transfer of the bare legal interest. The conveyance of Mrs. Oughtred's own shares to Peter was equivalent to the payment of a cash consideration. Here there was a contract for sale of the shares and that contract was completed by the transfer. A charge to ad valorem duty on sale may arise notwithstanding the fact that the vendor is not himself a party to the instrument completing the sale. If the contract for sale had been in writing it would have been liable to ad valorem duty under section 59 of the Act of 1891.

Upjohn J. stated in his judgment that the transfer was a document executed for the purpose of winding up the trust. That was not its purpose. To determine the stamp duty payable on a conveyance or transfer it is necessary to look back and see what was the transaction in respect of which the transfer was made. If an agreement for sale is completed some years later the transfer might not be a transfer on sale. Here the transfer was executed on the day fixed for the completion of the oral agreement. [Reference was made to *Garnett* v. *Inland Revenue Commissioners*,[2] *Cohen and Moore* v. *Inland Revenue Commissioners*[3] and *Fleetwood-Hesketh* v. *Inland Revenue Commissioners*.[4]] *Attorney-General* v. *Brown*[5] is an example of a case where the transfer was not made by the vendor. If in the present case the transfer was not a transfer on sale, in every case where there is an oral agreement to sell an equitable interest followed by a transfer of the legal interest, ad valorem duty will be avoided.

If it is necessary for the Crown to show that the subject-matter of the sale was transferred, it is submitted that the transfer extended to the equitable interest of Peter. If a conveyance is necessary to complete a transaction, then it is part of that transaction. Here it was always contemplated that the agreement should be completed by a transfer. The oral contract for sale did not pass any interest in the reversion to Mrs. Oughtred. It is only when the entire consideration has been paid that a vendor becomes a constructive trustee for his purchaser. That is not this case, and Mrs. Oughtred cannot rely on section 53 (2) of the Law of Property Act, 1925. The distinction between an agreement for sale and a conveyance on sale should not be obliterated. The decision in *Inland Revenue Commissioners* v. *G. Angus & Co.*[6] led to the passing of section 59 of the Act of 1891. Subsections (5) and (6) of that section show the relationship between a contract and a conveyance. [Reference was made to *West London Syndicate Ltd.* v. *Inland Revenue Commissioners*[7] and *Chesterfield Brewery Co.* v. *Inland Revenue Commissioners*.[8]]

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[2] (1899) 81 L.T. 633.

[3] [1933] 2 K.B. 126.

[4] [1936] 1 K.B. 351.

[5] (1849) 3 Exch. 662.

Looking at the terms of the agreement for sale, it is plain that both Mrs. Oughtred and Peter contemplated that it would be completed by a transfer of the shares. They could have left their agreement in contract, but that was not their bargain. The relationship of subsection (1) (*c*) to subsection (2) of section 53 of the Law of Property Act, 1925, does not fall to be considered in this case.

With regard to the Crown's claim to the additional 10s. duty, the validity of it depends on whether the transfer related to two distinct transactions with two heads of charge with the result that there should be two stamps: *Ansell* v. *Inland Revenue Commissioners*.[9] Here the transfer effected two things: it transferred the equitable reversionary interest the subject of the sale and it also conveyed the legal title. [Reference was made to Sergeant on Stamps, 3rd ed., pp. 206, 207.]

Peter Whitworth for the taxpayer, Mrs. Oughtred. The judgment below should be affirmed. Not to do so would be to disregard the principle that it is documents which fall to be stamped and not transactions: *Martin* v. *Inland Revenue Commissioners*,[10] *Inland Revenue Commissioners* v. *G. Angus & Co.*[11] *Brown, Shipley & Co.* v. *Inland Revenue Commissioners*[12] shows

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[6] (1889) 23 Q.B.D. 579; 5 T.L.R. 697.

[7] [1898] 2 Q.B. 507; 14 T.L.R. 569.

[8] [1899] 2 Q.B. 7; 15 T.L.R. 123.

[9] [1929] 1 K.B. 608.

[10] (1930) 15 A.T.C. 631.

[11] 23 Q.B.D. 579.

[12] [1895] 2 Q.B. 240; 11 T.L.R. 585.

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that a document must be stamped according to the nature of the transaction which on the face of it is thereby carried into effect. There is nothing in this transfer to suggest that it is transferring an equitable interest as well as the legal title. The object of the transfer was merely to divest the trustees of the bare legal title.

Once the dichotomy between the bare legal title and the beneficial interests is accepted, it is manifest that the trustees could not and did not transfer an equitable reversion which they never had. The Crown's claim necessarily involves the proposition that a conveyance of one property can also constitute a conveyance on sale of another property, but this is in direct conflict with section 54 of the Stamp Act, 1891, under which liability is conditional on the instrument conveying the actual property sold. This is not a case of a nominee implementing a sale, by the absolute beneficial owner, of shares as such, which is entirely distinguishable.

Section 53 (1) (*c*) of the Law of Property Act, 1925, has no relevance. That section is not concerned with stamp duty. If, apart from it, a document is not a disposition of an equitable interest, the section will not make it such a document. If the reversion was still outstanding in Peter before the transfer, the transfer did not alter that position. After the oral agreement Peter became a constructive trustee of his reversionary interest for Mrs. Oughtred and her life interest was enlarged into an absolute interest. The trustees of the settlement thereafter automatically held the shares in trust for her absolutely. [Reference was made to *J. & P. Coates* v. *Inland Revenue Commissioners*,[13] *Attorney-General* v. *Brown*,[14] *West London Syndicate Ltd.* v. *Inland Revenue Commissioners*[15] and *Fleetwood-Hesketh* v. *Inland Revenue Commissioners*.[16]]

The oral agreement being for value, subsection (2) of section 53 of the Law of Property Act, 1925, takes it out of subsection (1) (*c*) of that section. Even if the oral agreement did not operate to transfer Peter's equitable interest to Mrs. Oughtred, all parties are now estopped by the release from denying that it so operated.

The decision in *Garnett* v. *Inland Revenue Commissioners*[17] does not assist the Crown. There were recitals, in the instrument, purporting to say what had been done; here there are no recitals

[13] [1897] 1 Q.B. 778; 13 T.L.R. 548.

[14] 3 Exch. 662.

[15] [1898] 2 Q.B. 507.

[16] [1936] 1 K.B. 351.

[17] 81 L.T. 633.

in the transfer, but only in the deed of release, the stamping of which is not in issue.

Mrs. Oughtred's argument is that: (1) The share transfer cannot be a transfer on sale of Peter's equitable reversionary interest unless it in fact or in law transfers that interest, which it does not. (2) The Crown has conceded (as the case states) that the transfer is not a transfer on sale. (3) If, because of section 53 (1) (*c*) of the Law of Property Act, 1925, the equitable reversionary interest was still outstanding in Peter immediately before the execution of the share transfer, it was still outstanding in him immediately after such execution. (4) The transfer was in any case manifestly not on sale, but on the winding up of the trust.

This is a single document. It cannot be charged to stamp duty under two heads of the Schedule to the Act of 1891. [Reference was made to *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[18]]

Wilberforce Q.C. in reply. The Crown has not conceded that this is not a transfer on sale. The commissioners merely assessed the duty under two heads and the court has to decide which of the two claims is good in law, and to fix the duty. That must be done by ascertaining the nature of the transaction on which this document was executed. What was intended by the parties was the transfer of the shares to Mrs. Oughtred. The transaction was completed by the transfer to her on June 26, which vested in her the entire beneficial and legal interest in the shares. The conveyance or transfer on sale does not need to be of the exact property sold, nor be made by the vendor of the property. That is consistent with section 54 of the Stamp Act, 1891, and the schedule on "Conveyance or Transfer on Sale."

When the schedule speaks of conveyance or transfer on sale, it means a conveyance or transfer by way of completion of the sale or for the purpose of carrying the sale into effect. That fits in with the *Brown, Shipley & Co.* case,[19] which is a direct decision on the interpretation of the schedule. See also dicta in the *West London Syndicate* case,[20] *per* Channell J., that if a declaration of trust had been completed by conveyance, that would have borne ad valorem duty. The Crown need not show that the conveyance or transfer included the equitable interest. However, if one analyses the document with the deed of release, that was the legal result, for Peter, the beneficial owner, by his co-operation in the release, made himself a party to the transfer so that his reversionary interest passed to Mrs. Oughtred. It is enough to show that the transfer was on the completion of the sale.

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[18] [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

[19] [1895] 2 Q.B. 240.

[20] [1898] 1 Q.B. 226, 240.

The judgment below proceeded on the basis that the constructive trust operated to pass the equitable interest to the purchaser. It is submitted that that is wrong.

Cur. adv. vult.

May 15. LORD EVERSHED M.R. read the judgment of the court. The question in this appeal is whether a transfer of shares in ordinary form is chargeable with ad valorem stamp duty, as upon a sale, by reference to the consideration therefor; or only with the sum of 10s. The facts are as follows:

Immediately prior to the making of the oral agreement about to be related, Mrs. Phyllis Brown Oughtred, the respondent in this court, had the beneficial enjoyment during her own life of 100,000 £1 preference shares and 100,000 £1 ordinary shares of William Jackson & Son Ltd. standing in the names of the trustees (including herself) of a settlement dated January 1, 1924.

By virtue of an appointment by Mrs. Oughtred in favour of her only son, Peter Bentham Oughtred (hereafter called " Peter "), pursuant to a power in that behalf contained in the settlement, the reversionary beneficial interest in the said shares, subject to Mrs. Oughtred's life interest, belonged absolutely to Peter.

On June 18, 1956, an oral agreement was made between Peter and his mother to the effect that (to quote the findings in the case stated) " Peter would on June 26 " (following) " exchange his " interest under the settlement " for certain other shares in the same company belonging absolutely to Mrs. Oughtred " to " the intent that " (Mrs. Oughtred's) " life interest " (under the settlement) " should be enlarged into absolute ownership thereof."

On June 26, 1956, three deeds were executed, viz.: (1) a deed of release whereby, after reciting the various matters of fact above mentioned, Mrs. Oughtred and Peter gave to the trustees of the settlement of 1924 a complete release and discharge from all their obligations as such trustees; (2) the deed of transfer, the subject of this appeal, of the 200,000 shares in William Jackson & Son Ltd. from the trustees of the settlement to Mrs. Oughtred; and (3) a deed of transfer of the consideration shares in the same company from Mrs. Oughtred to nominees of her son.

We have mentioned the three deeds in the order which, if chronological, would be most favourable to Mrs. Oughtred. There was, however, no evidence or finding as to the order in which the deeds were in fact executed, and in our judgment they should be regarded as having been executed contemporaneously.

In *Grey* v. *Inland Revenue Commissioners* [1] the problem, and the only problem, was one arising upon the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, and it appeared at one time that a like problem arose in the present appeal also. It was and is the contention of the Crown that the oral contract of June 18, 1956, had been ineffective to transfer Peter's reversionary equitable interest in the shares to his mother. Upjohn J. had rejected this argument on the ground that, as a result of the contract, Peter had, in any case, become a constructive trustee of his interest for his mother, that subsection (2) of section 53 of the Law of Property Act, 1925, excepted constructive trusts from the operation of subsection (1), and (accordingly) that the result was the same for present purposes as though Peter had on June 18 effectively assigned his interest to his mother, leaving the legal estate in the shares outstanding in the trustees upon trust absolutely for Mrs. Oughtred. In this court the case for the Crown has, we think, been somewhat differently presented, and in the end of all, the question under section 53 of the Law of Property Act, 1925, does not, in our judgment, strictly call for a decision. We are not, however, with all respect to the judge, prepared to accept, as we understand it, his conclusion upon the effect of section 53 of the Law of Property Act, 1925.

In this court, Mr. Wilberforce has put the Crown's case alternatively. In the first place he has said that since immediately before the execution of the transfer on June 26, Peter's equitable reversionary interest remained in him, and since by the effect of the transfer Mrs. Oughtred acquired a full legal and beneficial title to the shares, therefore the transfer must have operated both to assign to Mrs. Oughtred Peter's reversionary interest and also the legal estate. On this view, which the Special Commissioners accepted, the transfer should be stamped, both ad valorem in respect of the former property, and with 10s. in respect of the legal estate. Alternatively, Mr. Wilberforce contended that the transfer, read in the light of the contemporary transfer of the other shares to Peter's nominees, and of the deed of release, was in truth nothing other than the completion and the contemplated method of completion of the oral contract, and so was a "conveyance or transfer on sale of property" within the meaning of section 54 of, and the First Schedule to, the Stamp Act, 1891.

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[1] Post, p. 690; [1958] 2 All E.R. 428.

Apart from the point above mentioned (under section 53 of the Law of Property Act, 1925), the Crown's former alternative is, in our judgment, faced with the formidable objection that, if the transfer operated as an assignment of Peter's interest as a distinct item of property (as must follow from the Crown's claim to the additional 10s. duty), then how was it achieved in the absence of Peter as a conveying party? We have found difficulty in appreciating the answer to this objection, but it is, in the event, unnecessary for us to express a view upon it, for we have come to the conclusion that the Crown is entitled to succeed upon Mr. Wilberforce's second argument, though the result is to diminish the amount of duty leviable by the item of 10s.

It is undoubtedly true that stamp duty is leviable upon instruments and not upon transactions. But it is equally clear that the court is not thereby debarred from inquiring what is the true nature and intended purpose of the instrument sought to be charged. In the present case the transfer in suit, together with the transfer to Peter's nominees by his mother of the consideration shares, were contemporaneous with the deed of release. The terms of the last-mentioned deed are, in our judgment, of vital significance. It recites that on the previous June 18 Peter and his mother had agreed that they would on June 26 exchange his reversionary interest for her shares "to the intent that" Mrs. Oughtred's life interest "should be enlarged into absolute owner-"ship thereof." It is true that the recital continues (somewhat ungrammatically) "The trust fund . . . is now held by the "trustees in trust for Mrs. Oughtred absolutely . . . and it is "intended that the same shall forthwith be transferred to Mrs. "Oughtred." But the operative part is: "Now in consideration "of the premises *and of the transfer to be made as aforesaid*" followed by a release and discharge to the trustees. In our judgment, in the light of the language which we have quoted, and of the fact that the oral contract was one for an exchange to be effected on June 26, the proper conclusion is that the transfer constituted (as it was intended and contemplated that it should) the completion of the oral bargain made eight days before; and so constitutes the conveyance upon, that is to say, consequent upon and in implementation of, the contract for sale of June 18.

The material part of the judge's judgment was [2]: "You must "look at the facts of each case. Plainly it is not essential that "the vendor should be a party. For example, where shares are

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[2] [1958] Ch. 383, 391.

"in the names of nominees the transfer from such nominees is "plainly a conveyance on sale, and, despite Mr. Whitworth's "submission to the contrary, in such a case it is not necessary to "mention expressly the equitable interest in the deed of transfer. "In this case, however, the appellant could not call on the "trustees to convey the shares to her merely upon proof of "the oral agreement. They were entitled to say, and in this case "presumably did say: 'Here is a subsisting trust, and we will "'not part with the trust assets except with the assent of every-"'one who is interested in them upon having a release in the "'usual way not only from you but from Peter. We are not "'concerned with dealings between beneficiaries.'

"Although the transfer was executed as a direct result of the "agreement for sale and really upon the occasion thereof, still it "remains in my judgment incorrect in the particular circum-"stances of this case to describe it as a conveyance on sale. "The transfer was, in my judgment, a transfer not on sale but "on the winding up of the trust and on the release of the "trustees. This point also fails." With the earlier part of this passage we respectfully agree. But we differ from the judge in his conclusion. We do not think, with all respect to him, that, in light of the circumstances we have mentioned, the transfer can properly be regarded as one consequent upon a winding up of the trusts; or, even if it was so in some sense, that it was not therefore in substance and reality a completion of the contract.

As the judge observed, it is not essential that a vendor should be a party to the instrument which constitutes the completion of his contract for sale. An obvious example, given by the judge, is a transfer of shares by the vendor's nominees. The case of *Attorney-General* v. *Brown*[3] is also authority for such a view. Though the precise point was a different one, the substance of the matter in that case was that the grant of a lease by the freeholder to B constituted the completion of A's agreement to sell to B for valuable consideration his own contractual right to a lease from the freeholder. If, immediately after the transfer, Mrs. Oughtred had the whole legal and beneficial interest in her shares, and if, immediately prior to the transfer (and the other contemporary documents), she had not got (as, in my view, she had not) the entire beneficial interest, then, in our judgment, it must follow that the former state of affairs was achieved, as it was intended that it should be, by the instrument of transfer, which

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[3] (1849) 3 Exch. 662.

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thereby completed and implemented the bargain that mother and son had previously made.

The distinction between the two alternative presentations of the Crown's case may be a fine one, but it is real. It is of the essence of the former alternative that the transfer operated to convey two separate and distinct "properties," viz., the legal estate and Peter's reversionary equitable interest, the Crown claiming duty in respect of each "conveyance." Though the vendor under the contract need not be a conveying party, the latter must, as we conceive, be in a position to convey the property alleged to pass. The second alternative treats the three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were thus enabled and entitled to transfer to Mrs. Oughtred (as the transfer on the face of it purports to do) the shares themselves with all rights and benefits attached thereto.

For these reasons we think that the appeal should be allowed.

Appeal allowed.
Leave to appeal to the
House of Lords.

Solicitors: *Solicitor, Board of Inland Revenue; Moeran, Oughtred & Co.*

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Lord Evershed M.R., Morris and Ormerod L.JJ.

GREY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[1957 No. 52.]

Revenue—Stamp duty—Gifts inter vivos—Oral settlement—Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Meaning of "disposition"—Oral declaration by cestui que trust directing trustees to hold his interest on new trusts—Law of Property Act, 1925, *s.* 53 (1) (*c*).

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In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the settlement of 1950, to the intent that such direction should result in the entire exclusion of H. from all future right, title and benefit to or in the shares and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust which H., although not expressed to be a party thereto, executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund.

The six declarations of trust were assessed to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held (Lord Evershed M.R. dissenting), that the directions given to the trustees on February 18, though not operating as an assignment of H.'s equitable interests, were a purported "disposition" of them within the meaning of section 53 (1) (*c*) [1] of the Law of Property Act, 1925, and because they were not made in writing, as required by that provision, they were ineffective.

The word "disposition" in the section must be given its wide meaning in normal everyday usage.

(2) That the declarations of March 25 were effective and were chargeable to the assessed ad valorem stamp duty.

Per Lord Evershed M.R. Judged against the general background of the characteristics of equitable interests the direction of February 18 was distinct in both form and substance from an assignment; it no more was or involved a "disposition" of a subsisting equitable interest than did a formal declaration of trust by an absolute proprietor of property and, accordingly, like such a declaration of trust, it could take effect without writing. Not being itself a "disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925, it did not have to be treated as such because it had the incidental result of overriding an existing equitable interest.

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[1] Law of Property Act, 1925, s. 53 (1): ". . . (*c*) a disposition of an "equitable interest or trust subsisting "at the time of the disposition, must "be in writing signed by the person "disposing of the same, or by his "agent thereunto lawfully authorized "in writing or by will."

Per Ormerod L.J. "Disposition" in section 53 (1) (*c*) should not be restricted to "grants and assignments" within the meaning of section 9 of the Statute of Frauds, 1677.

Decision of Upjohn J. [1958] Ch. 375; [1958] 1 All E.R. 246 reversed.

APPEAL from Upjohn J.

This was an appeal by the Crown from a decision of Upjohn J. made on December 3, 1957, allowing an appeal by Arthur William Grey and Leslie Richard Randolph from an assessment of the Inland Revenue Commissioners, who had assessed six declarations of trust dated March 25, 1955, to ad valorem duty as voluntary dispositions within the meaning of section 74 of the Finance (1909–10) Act, 1910.

The following facts appear from the case stated: The appellants are the trustees of six settlements, five made in 1949 and one in 1950, each made by Edward William Hunter as settlor of the one part and the appellants of the other part, directing the appellants to stand possessed of property comprised in the settlement on certain trusts declared for a named grandchild of the settlor, with the exception of the sixth settlement made in 1950 which was in favour of the settlor's then existing and certain other grandchildren who might thereafter be born.

On February 1, 1955, Hunter by an instrument of transfer of that date transferred to the appellants 18,000 ordinary shares of £1 each in Sun Engraving Co. Ltd. These shares were to be held by the appellants as nominees for and to the order of Hunter. This transfer was stamped with the duty of ten shillings following a certificate by the parties thereto that no beneficial interest passed thereunder.

On February 18, 1955, a meeting took place at the offices of the company at which there were present Hunter, the appellants and the senior partner in a firm of [solicitors]. At this meeting Hunter orally and irrevocably directed the appellants thenceforth to hold the said shares which he had transferred to them on February 1, 1955, and the income thereof [as to five blocks of 3,000 shares each upon the trusts respectively of the five settlements executed in 1949 in favour of his respective grandchildren, and as to 3,000 shares on the trusts of the settlement of 1950] to the intent that such direction should result in the entire exclusion of Hunter from all future right, title and benefit to or in the said shares or any of them and the income thereof.

On March 25, 1955, Hunter and the appellants each executed the six deeds called declarations of trust. . . . The deeds were each drawn in similar form. Each deed recited that the appellants were the holders of 3,000 ordinary shares in Sun Engraving Co. Ltd., that on February 18, 1955, Hunter gave the oral direction referred to above, that the appellants assented to and accepted the trusts reposed in them by the direction of Hunter and that the giving of such direction on February 18, 1955, and in manner hereinbefore referred to and the nature thereof were testified by the execution by Hunter of the deed. It was then witnessed by each deed and the appellants thereby acknowledged and declared that they had been since February 18, 1955, and were then holding the said 3,000 shares therein referred to and the income thereof upon such trusts and with and subject to such powers and provisions as were in the relevant settlement declared and contained concerning the trust fund as therein defined or such of the same trusts powers and provisions as were then or might thereafter be subsisting or capable of taking effect to the intent that the said shares should since February 18, 1955, form an addition to and be one fund with the said trust fund for all purposes. [Copies of the deeds were annexed to the case and the terms are set out in the judgment of Morris L.J.]

It was agreed between the appellants and the commissioners that the value of each of the ordinary shares of £1 each in Sun Engraving Co. Ltd. was £3 10s. on March 25, 1955.

The commissioners were of the opinion that each of the instruments presented for adjudication was a conveyance or transfer by Hunter of his equitable interest in the shares referred to in that instrument and that such conveyance or transfer was a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910, and was liable to ad valorem duty. . . . They accordingly assessed the duty with which each of the said instruments was chargeable at the sum of £210 ad valorem duty. . . . The appellants contended that each of the instruments presented for adjudication was no more than a record under seal of what had already taken place, that it was not a conveyance or transfer operating as a voluntary disposition inter vivos and that each instrument was chargeable with a fixed duty of ten shillings only under the head of charge "Declaration of any use or trust" in the First Schedule to the Stamp Act, 1891.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. The instruments of March 25 were conveyances or transfers operating as voluntary dispositions inter vivos and were liable to ad valorem duty. The oral directions given on February 18 did not operate as a parting by the settlor with his beneficial interest, because they constituted a disposition of an equitable interest subsisting in the shares at the time of the disposition within the scope of section 53 (1) (*c*) of the Law of Property Act, 1925, and, not being in writing as required by that provision, that disposition was ineffective. As the beneficial interest did not pass on February 18, it is conceded by the taxpayers that it must have passed by the instruments of March 25. If, however, it should be held that both transactions were ineffective, then the equitable interest is still in the settlor and the whole scheme will have to be begun again.

The rule that, although a trust of personalty can be made by parol, an assignment of a subsisting equitable interest has to be made in writing stems from section 9 of the Statute of Frauds, and section 53 (1) (*c*) of the Act of 1925 leads to substantially the same result. It seems to have been thought for a long time that section 9 only related to equitable interests in land: see Lewin on Trusts, 4th ed. (1861), p. 451, to 12th ed. (1911), p. 890, inclusive; and similar doubt is expressed by Professor Austin Scott in his book on Trusts. Maitland in his Lectures on Equity (1936) emphasized at p. 58 that the section applied to all assignments. There are certain differences in language and subject-matter between the two statutory provisions, and if there is any difference in substance, then, of course, the later provision prevails.

The argument for the Crown can be put by four propositions: First, an owner of a subsisting equitable interest, the legal estate being vested in trustees, can make a settlement or trust of that interest in either of two ways: (a) by declaring himself a trustee of it for another, or (b) by assigning it to trustees to be held on trust. The third method referred to by Upjohn J. is really an assignment: *Milroy* v. *Lord* [2]; *Richards* v. *Delbridge*.[3] As it is manifest that the settlor did not intend to make himself a trustee in this case, if a trust has been constituted at all, it must have been by the other method. Sir George Jessel M.R. in *Richards* v. *Delbridge* [4] was, admittedly, speaking of the legal owner, but the same principles apply to the settlement of an equitable interest. Section 53 applies to any "disposition" subsisting at the time of the transaction, whether it is called an assignment or something else. Upjohn J. said that this transaction was not an assignment but a transfer by way of trust, but it is submitted that the two are not mutually exclusive, so that, even if this was a transfer by way of trust, that would not prevent it from being an assignment. It may have been the creation of a trust over what was assigned to the trustees. After the transaction the whole beneficial interest was vested in the beneficiaries under the settlement. It was not a case of extinction and rebirth but the direct transfer to the trustees for the benefit of others of a subsisting equitable interest.

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[2] (1862) 4 De G.F. & J. 264.

[3] (1874) L.R. 18 Eq. 11.

[4] Ibid. 14.

Second, where, instead of appointing new trustees, the settlor directs the existing trustees who hold the legal estate to hold it on new trusts, that is in effect an equitable assignment to those trustees. There is no basic difference between the case where new trustees are appointed and the case where the settlor employs the existing trustees. In this case he was seeking to divest himself of all beneficial interest. An assignment in equity does not have to be in any particular form: see Lord Macnaghten in *Brandt's (William), Sons & Co.* v. *Dunlop Rubber Co.*[5]

Third, for the purpose of section 53 (1) (*c*) there is no distinction between a disposition by way of trust and any other; if the interest transferred is a subsisting equitable interest, the section applies, whatever the method of disposition may be. There is no valid distinction for this purpose between an assignment and something which operates as one. The only valid distinction is between a transaction which gives rise to an equitable interest and a transfer of a subsisting equitable interest.

Fourth, the settlor has disposed of his interest in the shares, which was a subsisting interest, not by the ineffective attempt on February 18, but by the declaration on March 25. He was a party to the declaration in the sense of having executed it in pursuance of the recital in the body of the deed. This point was conceded below and it is anticipated that it is conceded here.

The authorities fall into three groups. First, there are the stamp duty cases. Second, the modern cases dealing with the nature of a direction to trustees and, third, the older cases which are mentioned in the judgment of Upjohn J. In *Martin* v. *Inland Revenue Commissioners*[6] the owner of an equitable

[5] [1905] A.C. 454; 21 T.L.R. 710.

[6] (1930) 15 A.T.C. 631; also reported in Sargeant on Stamp Duties, 3rd ed. (1957), p. 350.

interest in property under a resulting trust made a declaration of trust of the property in the trustees' hands, and it was held that that was a conveyance operating as a "disposition" inter vivos within section 74 of the Finance (1909–10) Act, 1910. As the disposition was in writing the question in the present case did not arise, but, clearly, the section would have applied, for the transaction was, as in the present case, a disposition of a subsisting equitable interest. If anything, this is a stronger case than *Martin* v. *Inland Revenue Commissioners*,[6] for here the resulting trust to the settlor lasted nearly three months, whereas in that case it lasted only for a scintilla temporis. *Fuller* v. *Inland Revenue Commissioners* [7] also illustrates the operation of section 74 in relation to dispositions of beneficial interests.

These cases show that where there is a declaration of trust of property in the legal ownership of trustees, whether the declaration is under a power, as in *Fuller* v. *Inland Revenue Commissioners*,[7] or by the equitable owner, there is a disposition in favour of the persons taking under the trust, even if they are not at the time necessarily in existence or immediately ascertainable.

The second group of cases is as to the nature in the eyes of the law of the direction given to the trustees by the beneficial owner. They show that it is an assignment of the beneficial interest: see *Richards* v. *Delbridge* [8] and *Brandt's* (*William*), *Sons & Co.* v. *Dunlop Rubber Co.*[9] *In re Chrimes* [10] was decided on the footing that the deed poll constituted an actual and complete assignment, for it was only by making an actual assignment of the interest while discovert, which was inconsistent with the continuance of the restraint on anticipation, that the restraint could be got rid of.

If the equitable owner does not declare trusts in favour of beneficiaries absolutely, then he will remain in the picture. A bare equitable estate will then be outstanding, as where the trusts declared are not for X absolutely but for X for life and then for Y. Alternatively, in such a case the owner of the equitable estate drops out altogether so that he must have disposed of his interest. But that is not what was done here. A direction given by the owner of the equitable interest to the trustees to hold for a third person operates as a complete transfer of the interest in the sense of an assignment (total or partial according to the extent of the direction). Upjohn J. distinguished between something operating as an assignment and an assignment, and he sought to rely on what Sargant J. said in *In re Chrimes.*[11] But it is submitted that Sargant J. did not say that. In that case the transaction clearly was an assignment, and Sargant J. so found.[12] But in any case the distinction is irrelevant, because a transaction will be just as much a "disposition" for the purposes of section 53 if it operates as an assignment as if it is one. A "disposition" is an operation which has the effect of disposing of something. In a case such as *In re Chrimes*,[13] where the original owner holds on after the transaction but on different trusts, it may perhaps be more appropriate to say that a "disposition" has taken place rather than an assignment. In *Timpson's Executors* v. *Yerbury*[14] the question was whether Mrs. Timpson had "disposed" of her income. Romer L.J. said that there were four ways of getting rid of her interest, and he grouped a direction to trustees as being an assignment.

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[7] [1950] 2 All E.R. 976.

[8] L.R. 18 Eq. 11.

[9] [1905] A.C. 454.

[10] [1917] 1 Ch. 30.

To find an assignment it is necessary to find something in the assignee which had formerly been in someone else. Mrs. Timpson's mandate might have been revoked at any time before any income had passed to the children, but here the settlor's directions were intended to be irrevocable; he intended to dispose of his equitable interest once and for all by assignment. In *In re Wale, decd.*,[15] it was held in terms that the direction was an assignment. The judge applied what Lord Macnaghten had said in *Brandt's (William), Sons & Co.* v. *Dunlop Rubber Co.*[16] and said that a direction to trustees is a form of equitable assignment, and then, following *In re Chrimes*,[17] he said that the transaction in that case was an equitable assignment. He found that the intention of the settlor had been sufficiently manifested notwithstanding the misrecital. That case is also of some assistance on the validity of the declarations of March 25. It is submitted that there was a less degree of error in the recitals in this case than in *Wale's* case.[18]

Of the old cases—the third group—*Rycroft* v. *Christy*[19] is not of assistance, for the direction was in writing, and so no question arose under the statute. The direction was, however, treated as equivalent to a transfer. *Bentley* v. *Mackay*[20] turned on its own particular facts and section 9 of the Statute of Frauds was not referred to. This case was relied on in the court below because some of the directions were by parol, but the point was not taken in it that they were ineffective. The question was, as in *Timpson's Executors* v. *Yerbury*,[21] whether the directions were a sort of mandate or whether it appeared that the settlor had intended to divest himself of the entire interest in the fund, and it was regarded as an intended transfer of the equitable interest. *Tierney* v. *Wood* [22] turned on section 7 of the Statute of Frauds, now replaced by section 53 (1) (*b*) of the Act of 1925. It decides that the only person able by law to declare trusts is the beneficial owner and not the trustees who have the legal estate. It does not throw any light on whether the person making the declaration is making a disposition. *Paterson* v. *Murphy* [23] is of no assistance at all. It concerned a chose in action. At that time a legal chose in action could not be assigned in equity and the question arose as to the need for writing. *M'Fadden* v. *Jenkyns* [24] was another case of a chose in action. Lord Lyndhurst L.C. said [25] that a declaration of trust of personalty can be made by parol (which is not disputed) and that what had been done was equivalent to that. The case is not of any assistance, since it did not relate to an equitable interest, still less to a subsisting equitable interest. [Reference was also made to *Edwards* v. *Jones* [26] and *Wheatley* v. *Purr*.[27]]

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[11] [1917] 1 Ch. 30.
[12] Ibid. 36.
[13] [1917] 1 Ch. 30.
[14] [1936] 1 K.B. 645, 664.
[15] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280.
[16] [1905] A.C. 454.
[17] [1917] 1 Ch. 30.
[18] [1956] 1 W.L.R. 1346.
[19] (1840) 3 Beav. 238.
[20] (1851) 15 Beav. 12.

Lambe v. *Orton* [28] was not cited below, though it is mentioned in *In re Wale, decd.*[29] In that case a direction to pay to a third person absolutely was held to be an assignment.

[LORD EVERSHED M.R. There the assignment was of his rights to go to the court to have the estate administered. There was no consideration. Could he have withdrawn it?]

A gift can be made of any property. The only question is whether everything necessary according to the nature of the property has been done to transfer the property to the donee. If, as in the present case, the gift is of the bundle of rights comprised in a company share, then the transfer must be in accordance with the articles of association. No special formalities are required for an equitable assignment, but if the interest is subsisting at the time, then the transfer has to be in writing.

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[21] [1936] 1 K.B. 645.
[22] (1854) 19 Beav. 330.
[23] (1853) 11 Hare 88.
[24] (1842) 1 Phillips 153.
[25] Ibid. 157.
[26] (1836) 1 My. & Cr. 226.
[27] (1837) 1 Keen 551.
[28] (1860) 1 Dr. & Sm. 125.
[29] [1956] 1 W.L.R. 1346.

Even if it should be held that the transfer in this case was not an assignment but a release or surrender of an interest and the creation of something else, it is submitted that the section applies. In *Inland Revenue Commissioners* v. *Buchanan*[30] a settlement was held to be a disposition.

J. Pennycuick Q.C. and *W. T. Elverston* for the taxpayers. The first question is whether on its proper construction the oral direction given on February 18 constituted a declaration of trust of the property, as it was expressed to be, or an assignment of the subsisting equitable interest of the settlor. If it was an assignment, there is the further question, to whom was it assigned? An assignment of a subsisting equitable interest is void, unless made in writing, by virtue of section 53 (1) (*c*) of the Law of Property Act, 1925, but that section does not apply to a declaration of trust, even if the indirect consequences are similar to those of an assignment.

If, as is submitted, the settlor effectually created a trust of the shares on February 18, the memorandum declaring the trusts made on March 25 is not chargeable with stamp duty ad valorem. But if the directions given on February 18 were ineffective, then it is not disputed that the subsequent declarations of March 25 operated to pass the equitable interest and are chargeable to ad valorem duty as a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910.

The general principles on which an owner of an interest in property can alienate it are not in dispute. He can transfer both the legal and equitable interests in it by assignment, or he can declare himself a trustee of it on stated trusts. Where the legal title in property is vested in trustees holding for the beneficial owner absolutely, there is a third method: he can effectively direct the trustees to hold the property on stated trusts—an everyday method of creating a settlement of personalty: see Key and Elphinstone's Precedents, 15th ed., vol. 2, pp. 610 and 614, which recites a transfer to the trustees. The trustees are parties to and execute the settlement, but they cannot themselves declare the trusts because they have at no stage any beneficial interest in the property. There is no assignment in such a case. The owner, by declaring the new trusts, has created new beneficial interests in the property, but he has not assigned his existing beneficial interest to anyone. It has

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[30] Ante, 289, 296; [1957] 2 All E.R. 400; 37 T.C. 365.

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simply ceased to exist, without any express provision: see *Tierney* v. *Wood*.[31] Speaking loosely, it may be said that the beneficial interest, originally in the settlor, has come to be in the beneficiaries under the settlement, but on analysis that is not accurate. Such a "transfer" would not in any case be within either section 9 of the Statute of Frauds or section 53 (1) (*c*) of the Law of Property Act, 1925.

Where a trustee holds property as a legal owner in trust for a beneficiary absolutely, it is open to the beneficiary to give either of two distinct directions to the trustee. He may direct the trustee to transfer the property to a third party. If he does, and if the direction is communicated to that third party, there is an equitable assignment in favour of the third party, but until communication there is only a revocable mandate to the trustee. For example, if the beneficial owner wants to make a gift of part of his interest to XY, he can write to the trustee and say, "pay "that part to XY"; that is a revocable mandate. But if he tells XY, then there is an equitable assignment which is effective as a gift: see Lord Wright M.R. in *Timpson's Executors* v. *Yerbury*,[32] and Halsbury's Laws of England, 2nd ed., vol. 4, pp. 441 and 443, where *In re Hamilton*[33] is cited. Alternatively, the owner may direct the trustee to hold on stated trusts. If he does that, he creates a trust which is not revocable. The beneficial owner can adopt either method and it depends on the terms of the direction to the trustee, whether written or verbal, which method he is seeking to follow. If he uses words of trust, then he is creating a trust; if not, he is making an assignment: see *Lambe* v. *Orton*.[34]

Where property is vested in A as legal owner and the beneficial interest is in B, and B declares trusts of that property, the declaration creates trusts of the property itself and not trusts of the equitable interest. If the trusts declared extend to the whole equitable interest, it ceases to exist. If they extend to part, the interest is correspondingly diminished. In such a case there is nothing akin to a surrender or release of the equitable interest. The only operative act is the creation of new trusts, and the effect of that is that the existing equitable estate either disappears or shrinks. There is no operation dealing directly with the equitable interest. This is not unique; the same thing happens when the owner of a power exercises it and by so doing either brings the power to an end or diminishes the interests in default of appointment.

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[31] 19 Beav. 330.

[32] [1936] 1 K.B. 645, 658.

[33] (1921) 124 L.T. 737.

[34] 1 Dr. & Sm. 125.

[LORD EVERSHED M.R. referred to *Sinclair* v. *Brougham*,[35] in which Lord Parker pointed out[36] that although equitable rights were originally in personam, they have come to acquire the characteristics of proprietary rights.] [Reference was made to Snell's Principles of Equity, 24th ed., p. 37.]

Even if it should be held that although the equitable owner expressed himself as creating trusts, he was nevertheless assigning his interest to someone else, then it is submitted that the transaction was not a " disposition " within section 53 (1) (*c*). The equitable interest of the settlor has disappeared because there is nothing left for it to feed on, but if the owner of the new interest happened to be outlawed, for example, the owner of the superseded interest would come back into his own. The interest lies dormant, but it has not been transferred.

[LORD EVERSHED M.R. referred to *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[37]]

A surrender is different, for that puts an end to the surrendered interest. A surrender comes within section 53 (1) (*c*). Here the interest is overridden by the creation of trusts paramount.

If the transaction of February 18 had been effected in writing, then stamp duty would have been payable under section 74 of the Finance (1909–10) Act, 1910: see *Martin* v. *Inland Revenue Commissioners*.[38] By sections 54 and 62 of the Act of 1891 the meaning of conveyance was extended to cover a number of transactions which would not be conveyances in the ordinary sense, and the Act of 1910 provided that any " conveyances " in the extended sense should be chargeable with stamp duty. A declaration of trust creating a beneficial interest in property may be a conveyance or transfer operating as a disposition within section 74, but it does not, of course, follow that it is a " disposition " within section 53 (1) (*c*) of the Act of 1925, or in the ordinary sense.

[LORD EVERSHED M.R. " Assignment " appears also to have been used loosely to describe things which are not strictly speaking assignments: see particularly Sargant J. in *In re Chrimes*.[39]]

Of the old cases, *Tierney* v. *Wood*[40] is the most helpful in the present case. There is not a trace in that case of the doctrine propounded by the Crown that if B assigns his equitable interest in property on trust to be held for someone else, that that is a disposition. The other cases are less directly in point—they concern choses in action. None of them is concerned with the case where A holds property on trust for B absolutely; that is this case. The modern cases of *In re Chrimes*,[41] *Timpson's Executors* v. *Yerbury*[42] and *In re Wale, decd.*,[43] are not particularly helpful. In *In re Chrimes*[44] the plaintiff had only a reversion. It was open to her to declare trusts of her interest or to assign it, but she was not in a position to create a trust of the trust property as a whole because she had only a partial interest in the property. She declared a trust of her reversionary interest. The judgment is very difficult to follow. The judge seems to have said that what purported to be, and was expressed as, a declaration of trust was an assignment. If he was saying that the owner of a beneficial interest could not declare a trust, it is submitted that he was wrong; and it is difficult to see how *Tierney* v. *Wood*[45] could have been cited in support, for in that case a declaration of trust was upheld as such. [Reference was made to Withers on Reversions, 2nd ed., p. 126.] In *Timpson's Executors* v. *Yerbury*[46] Mrs. Timpson again had only a limited interest in the trust property. It was obviously right in that case to hold that she never thought of creating a trust. All she gave was a revocable mandate which was never communicated to the children. It was in that context that Romer L.J. classified the various ways of disposing of equitable interests.[47] He was only concerned with the case in which the beneficiary had a limited interest. None of the old cases was cited to him and he was not addressing his mind to the case, such as this, where the property is held in trust for a beneficiary absolutely who creates a trust of the property itself by an appropriate declaration. *In re Wale, decd.*,[48] throws no light on the present problem.

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[35] [1914] A.C. 398; 30 T.L.R. 315.
[36] [1914] A.C. 398, 441.
[37] [1945] A.C. 221, 229.
[38] 15 A.T.C. 631.
[39] [1917] 1 Ch. 30.
[40] 19 Beav. 330.

The transaction of February 18 would not have been within the scope of section 9 of the Statute of Frauds, which applies only to "grants and assignments of any trust or confidence." The equitable interest has disappeared as the result of the creation of paramount trusts, but the owner of the equitable interest has not parted with or assigned it. Section 9 has now been superseded by section 53 (1) (*c*) of the Act of 1925 and there has, admittedly, been a change of language, but it is submitted that the new wording should not be given a wider meaning than the old. Section 53 is a consolidating provision and subsection (1) (*c*) is, in effect, a re-enactment of section 9. In such a context one would not expect to find a material alteration, and in the absence of a clearly expressed contrary intention "disposition" should be construed as limited to "grants and "assignments." The change in language has not anywhere been explained or noted, and it would be strange if so material an alteration in the law had gone unnoticed for so long.

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[41] [1917] 1 Ch. 30.
[42] [1936] 1 K.B. 645.
[43] [1956] 1 W.L.R. 1346.
[44] [1917] 1 Ch. 30.
[45] 19 Beav. 330.
[46] [1936] 1 K.B. 645.
[47] Ibid. 664.
[48] [1956] 1 W.L.R. 1346.

To be a "disposition" the interest which is transferred must remain identifiable throughout. Alternatively, a "disposition" is a direct dealing with an interest, even if only to destroy it. Paragraph (*c*) of section 53 (1) has no application to a transaction, which although not otherwise within it, has an incidental result equivalent to a transaction within it. *Inland Revenue Commissioners* v. *Buchanan*[49] was concerned with a different point. The instrument was dealing expressly and directly with the life interest of the individual. There is no instrument here dealing expressly with the interest of the settlor. [Reference was made to *M'Fadden* v. *Jenkyns*[50] and *Fuller* v. *Inland Revenue Commissioners*.[51]]

The problem can be analysed by four questions. First, can an equitable owner of property declare a trust of the property itself? Answer: Yes. Second, did the settlor express himself on February 18, 1955, as declaring trusts of the shares of which he had the beneficial ownership? Answer: Yes. Third, is a declaration of the trusts upon which property is to be held a disposition of a subsisting equitable interest in that property within section 53 (1) (*c*)? Answer: No. Fourth, is such a declaration of trust, although not itself such a disposition as is mentioned in question three, to be held to be such merely because it has the incidental result of overriding or superseding an existing equitable interest? Answer: No.

R. O. Wilberforce Q.C. in reply. It cannot be said that the equitable interest has not been disposed of here even if all that has happened is that it has gone into limbo. "Disposition" should be given its ordinary meaning of parting with something or getting rid of it. One has to look at the disposing end: *Inland Revenue Commissioners* v. *Buchanan*.[52] The question is not whether the interest has gone to anyone, but whether it has gone from someone who had it. There is no authority for suggesting that "disposition" must mean something different in section 53 of the Act of 1925 from the meaning which it has in section 74 of the Act of 1910. Many of the old cases were decided before section 53 (1) (*c*) had replaced section 9 of the Statute of Frauds. The Act of 1925 was a consolidating Act, but this provision is not a literal re-enactment of the earlier provision. No doubt the change in language reflects the changed attitude to equitable rights, which by 1925 had come to be recognized as proprietary rights. It is not conceded that this transaction would not have come within the earlier provision, but it is not necessary to consider that. The issue is whether it is within section 53 (1) (*c*). If there has been a material change in the statutory language, effect must be given to it. The construction of a consolidating statute is not limited by reference to the statutes it is codifying: Craies on Statute Law, 5th ed. (1952), pp. 333 et seq.

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[49] Ante, 289.

[50] 1 Phillips 153.

[51] [1950] 2 All E.R. 976.

[52] Ante, 289.

It is not correct to say that there cannot be a disposition unless what is disposed of remains identifiable throughout. That would not cover surrenders. On the facts here, the interest was identifiable after the transaction had been carried out. The settlor originally had the equitable interest in the shares and afterwards the beneficiaries had it (if the transaction was effective). In *Martin* v. *Inland Revenue Commissioners* [53] Rowlatt J. did not say, as he might have done if the taxpayer's argument is correct, that new interests had sprung up in the beneficiaries; but he held that Martin had dealt with his beneficial interest and had got rid of it. As in this case, what the settlor proposed to get rid of was a subsisting equitable interest. That case is not binding but it is in point on the meaning of "disposition."

To say that the declaration of trust has had the effect of extinguishing the original equitable interest so that what comes to be vested in the beneficiaries under the new trusts is a new interest is confusing this type of disposition with the exercise of a power of appointment. The exercise of a power brings into existence an interest which displaces what was there before. But in this type of case the settlor's equitable interest in the property was indefeasible. It was an absolute right of property and he declared trusts as a property owner. The intention and effect of that is quite different from the intention and effect of the exercise of a power of appointment, and the terminology relating to a power is inapplicable.

It is not of any significance that the argument now put by the Crown was not put in *Tierney* v. *Wood*,[54] because it was not needed there. There is no basis for a distinction in law between the case where the equitable owner has the whole interest and that where he has only part. The same technique is followed.

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[53] 15 A.T.C. 631.

The taxpayers have sought to distinguish between the case of a settlement through the medium of new trustees and one where the trustees already hold the legal estate. If new trustees are used, there is no question, on the authority of *Richards* v. *Delbridge*,[55] that the transaction can only be effected by disposing of the interest to them. Logically, the legal result of the operation if done the other way must be exactly the same.

There is no valid distinction between an operation dealing directly with the equitable interest and one which directly sets out to create trusts but has the incidental result of extinguishing an interest. In any case what was done here was a direct dealing with the equitable interest, both in form and substance. If the legal effect of a transaction is to remove an interest in property, it has disposed of it.

Cur. adv. vult.

May 15. The following judgments were read.

LORD EVERSHED M.R. The question presented for the determination of the court by the Commissioners of Inland Revenue in their case stated under section 13 of the Stamp Act, 1891, is whether instruments, self-inscribed as "declarations of trust," are liable to be charged with stamp duty, ad valorem, calculated by reference to the parcels of shares to which they respectively relate. The question so posed requires an answer to the inquiry: Are these several instruments chargeable as "conveyances or "transfers operating as voluntary dispositions inter vivos" within the scope and language of section 74 of the Finance (1909–10) Act, 1910, the relevant portion of which Act must, by the terms of its 96th section, be read and construed as one with the Stamp Act, 1891?

But, as Mr. Wilberforce pointed out at the beginning of his opening of the appeal on behalf of the Crown, the form of the question presented by the case stated disguises, as not uncommonly is so in stamp duty cases, the true nature of the problem raised. Though we were referred to sections of the Stamp Act containing definitions (e.g., sections 54 and 62), nothing in truth

[54] 19 Beav. 330.

[55] L.R. 18 Eq. 11.

turns upon the language or effect of section 74 of the Finance (1909–10) Act, 1910. If the instruments in question alone constitute or alone effectively declare the trusts upon which the several shares are now held (as it is of the essence of the Crown's argument that they do), then it is not in doubt that they fall within the ambit of section 74. Mr. Pennycuick, for the named trustees in the instruments (respondents in this court), so concedes; and it is in the obvious interest of the trustees and their beneficiaries that he should do so. We were concerned during the argument to be satisfied that the court could safely and properly accept the result of the concession; for it seemed that, on one view of the case (if the trustees' argument were not acceptable) then the final effect of the transaction before us (including the instruments in question) might be merely negative, so that no effective trusts had been constituted at all. For reasons which it will be more convenient to state after the facts have been set forth, we were so satisfied. If the trustees' argument, which Upjohn J. accepted, is not well founded, then the instruments are taxable under section 74. But, as I have said, the conclusion does not at all depend upon the solution of any question presented by the legislation relating to stamp duty. It depends rather upon a much more difficult problem under the general law; in the end of all, upon the question whether certain directions orally given to the trustees by a person, competent by virtue of his interest to give them, which the instruments recited and were according to their language intended to confirm, were effective in law to establish the trusts thereby specified; or whether they constituted " a disposition of an equitable interest or trust sub-" sisting at the time of the disposition " within the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, and so failed of effect through want of writing.

The relevant facts are fully set out in the case stated [as printed above], and are also related by Upjohn J.[1]

[His Lordship stated the facts and continued:] It will be convenient to dispose of the doubt, earlier mentioned, whether the court ought to act upon Mr. Pennycuick's concession if it rejected his main argument. The operative part of each of the declarations of trust witnessed that the trustees acknowledged and declared that they had been since the preceding February 18 " *and are now* " holding the shares upon the specified trusts. The directions given on February 18,

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[1] Ante, 375, 376; [1958] 1 All E.R. 246, 248.

1955, and their intention had been recited; and Mr. Hunter "testified" to the giving of the direction and his intention by executing the instruments: in the circumstances I am satisfied that if the directions were, for want of writing, ineffective on February 18, Mr. Hunter could not after March 25 recall or purport to revoke the beneficial interests arising under the trusts upon which, on that later date, the trustees declared, in his presence, that they held the shares. Whatever might be or have been the effect (if any) of the trustees' acknowledgment or declaration that they had so held the shares since the preceding February 18, it clearly follows, in my judgment, that (on the hypothesis that the oral directions on February 18 had no legal effect) the instruments of March 25, 1955, must have effectively established or constituted the relevant trusts and therefore must, as Mr. Pennycuick conceded, be conveyances or transfers operating as voluntary dispositions inter vivos within the terms of section 74 of the Finance (1909–10) Act, 1910, aided by the definition provisions of sections 54 and 62 (and particularly the latter) of the Stamp Act, 1891.

I return to the main question. It is, to my mind, though difficult, a short one. We were very properly referred to a number of cases, both ancient and modern. But, in the end, the problem will be resolved as the few short questions put to us at the end of their arguments by Mr. Pennycuick and Mr. Wilberforce are answered. It is not in doubt that on February 18, 1955, and immediately before the meeting on that day described in the case stated and recited in the instruments of March 25, 1955, the shares were vested in the trustees as registered proprietors; but the trustees held the shares upon trust wholly for Mr. Hunter, who was entitled, absolutely, to all the benefits belonging to them. The subject-matter being shares in a company, the right to transfer them depended upon the company's regulations; but, subject to those regulations, the trustees would be bound to deal with the shares and all the benefits attached to them as Mr. Hunter required. Those rights, which Mr. Hunter had in personam against the trustees, would be enforced, if necessary, by the courts. But, as Lord Parker pointed out in his speech in *Sinclair* v. *Brougham*,[2] equitable rights, though in origin they may have been rights in personam only, have come to acquire the characteristics of proprietary rights. In that sense, therefore, Mr. Hunter no doubt had an equitable interest in the shares, proprietary in character, of which, as such, he was capable of

[2] [1914] A.C. 398, 441; 30 T.L.R. 315.

"disposing." He was undoubtedly capable, in the eye of the law, or rather (perhaps) of equity, of assigning such "rights," such "interest" to another or others, wholly or in part; and if he desired or purported so to do, it is no less undoubted that, by the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, writing would be required to give effect to his desire.

Is that what Mr. Hunter purported to do on February 18, 1955? Mr. Wilberforce says "Yes." According to his argument, that is the sole question and that is the inevitable answer; for, by doing what he did, he purported to "dispose of," that is, to get rid of, all his beneficial rights. Moreover, the beneficial interests of those entitled under the declared trusts amounted, in sum, to the whole beneficial interest in the shares: that is, to that which formerly had belonged to Mr. Hunter. So (if this argument is right) the answer to the question put during the argument by Morris L.J.: "if Mr. Hunter on February 18, 1955, "purported to make a disposition, to whom and of what did he "dispose?" must be: "to the beneficiaries under the trust and "of the whole beneficial interest."

On the whole, I have come to the conclusion that this analysis, for all its attraction, is an over-simplification and ought not to be accepted.

It was conceded in argument, and cannot in my judgment be doubted, that it is competent for an owner of personal property to declare himself effectively by word of mouth a trustee of the property for another (see *per* Lord Lyndhurst L.C. in *M'Fadden* v. *Jenkyns*[3]). Such a declaration did not require writing for its efficacy according to section 9 of the Statute of Frauds; nor, in my judgment, is the situation altered by virtue of the repeal of that section and the substitution for it of section 53 (1) (*c*) of the Law of Property Act, 1925. True, where A is legally and beneficially the owner of the property, there is no room for the subsistence of an equitable interest in him distinct from the "legal" title. Still, if A declares himself a trustee of the property wholly for B, he may, in common sense and common terminology, be said to have "got rid of," that is "disposed of," his former subsisting beneficial interest.

It is also clear that equitable interests have the characteristic that they may be lost, defeated or destroyed in certain circumstances not involving, sensibly, any distinct dealing with or disposition of them. One example was given by Lord Parker in the passage above-quoted from his speech in *Sinclair* v. *Brougham* [4]; where the rights of the equitable owner are defeated upon a purchase for value of the legal estate by one without notice of the equitable interest. Another instance is the defeasance of a subsisting vested interest by the exercise of a special power of appointment.

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[3] (1842) 1 Phillips 153, 157.

From these instances it follows in my judgment that a subsisting equitable interest may be " disposed of " (in the popular sense of being got rid of), though it is not the subject of any " surrender " in favour of the holder of some other interest out of which the subsisting interest is derived, or on which it is dependent; and though it is not the subject of any assignment or of any dealing with it as a distinct subject-matter and as a continuing entity.

The true nature of what was done or purported to be done on February 18, 1955, has to be judged, in my view, in the light of what is said above. One other proposition may also be asserted. If property be vested in A upon trust, absolutely, for B, then B, in addition to his power of assigning his equitable interest and his power of declaring himself a trustee of it for C, may effectively direct A to hold the property—that is, the property itself and all interests therein—upon trust for C. That indeed, as Mr. Pennycuick pointed out, is in accordance with common form in settlements where at the date of the settlement the property (that is, the legal estate in it) has already been transferred to the trustees and where by the settlement the beneficial owner directs the trustees and declares the trusts upon which the property itself is to be held. The decision of Sir John Romilly M.R. in *Tierney* v. *Wood* [5] may be cited as authority for the general proposition.

The validity of the proposition does not, however (nor did the decision in *Tierney* v. *Wood* [5]), determine the question whether such a declaration of trust by way of direction on the part of the beneficial owner required or requires writing under section 9 of the Statute of Frauds or section 53 of the Law of Property Act. Such a method of dealing with a beneficial interest in personal property (with which alone we are concerned) appears, however, to have been regarded as distinct from both an assignment, on the one hand, and a declaration of trust of the interest in the beneficial owner's hands, on the other. See, for example, *per*

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[4] [1914] A.C. 398, 441.

[5] (1854) 19 Beav. 330.

Romer L.J. in *Timpson's Executors* v. *Yerbury*,[6] and *In re Chrimes*.[7] In *Timpson's* case[8] Romer L.J. said: "Now the "equitable interest in property in the hands of a trustee can be "disposed of by the person entitled to it in favour of a third "party in any one of four different ways. The person entitled to "it (1) can assign it to the third party directly; (2) can direct "the trustees to hold the property in trust for the third party "(see *per* Sargant J. in *In re Chrimes*[9]); (3) can contract for "valuable consideration to assign the equitable interest to him; "or (4) can declare himself to be a trustee for him of such "interest." But in neither case was the question involved with which we are concerned. Nor indeed does that question appear to have been directly the subject of any judicial decision, though Mr. Wilberforce has relied upon certain language used in *In re Chrimes*,[9] and also more particularly upon the language used by Rowlatt J. in *Martin* v. *Inland Revenue Commissioners*,[10] to support his argument that such a direction to the trustees and legal owner by the beneficial owner, even if it be in form distinct, nevertheless has the effect of, or necessarily involves, an "assignment" or at least "a disposition of an equitable interest "subsisting at the time of the disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925. The question for us is whether that submission is correct: and it must, I apprehend, be answered, in the absence of any direct authority, upon principle.

I am not prepared to dissent from the negative answer which Upjohn J. gave to the question. In other words, judged against the general background of the characteristics of equitable interests, I think on the whole that a direction of the kind given in the present case by Mr. Hunter is something distinct, not only in form, but also in substance, from an assignment; that it no more is or involves a disposition of a subsisting equitable interest than does a formal declaration of trust by an absolute proprietor of personal property, and accordingly that, like such a declaration of trust, it may take effect without writing. In form there can be no doubt that it is more closely analogous to such a declaration of trust than it is to an assignment. Indeed it is, in form, such a declaration, since it declares the trusts upon which the legal owner is to hold the property as, admittedly, it is within the province of the beneficial owner to do. In the present case the events of February 18, 1955, are found in paragraph 5 of the case stated. "Mr. Hunter orally and irrevocably directed the" (trustees) "thenceforth to hold the . . . shares . . . and the "income thereof" upon the trusts in the paragraph more particularly specified; and the instruments of March 25, 1955, contained recitals to the same effect coupled with acknowledgments and declarations by the trustees that they had so held the shares since the preceding February 18. Some significance should, in my view, be given to the use of the word "irrevocably." For, if, as Mr. Wilberforce contends, the transactions of February 18 purported to constitute an "assignment" of Mr. Hunter's equitable interest to the beneficiaries under the specified trusts, it is to be observed that no notice was given to any of such beneficiaries. In the absence of such notice it may be forcefully contended that any "assignment" might thereafter have been recalled by Mr. Hunter.

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[6] [1936] 1 K.B. 645, 664; [1936] 1 All E.R. 186.

[7] [1917] 1 Ch. 30.

[8] [1936] 1 K.B. 645, 664.

[9] [1917] 1 Ch. 30.

[10] (1930) 15 A.T.C. 631; also reported in Sargeant on Stamp Duties, 3rd ed. (1957), p. 350.

I have not, accordingly, been persuaded that there is any principle of law or equity which prevents the transaction of February 18, 1955, being in substance as well as form other than it, upon its face, purported to be and from taking effect accordingly—namely, as a direction to the trustees declaring the trusts upon which they should hold the property: and if the result (assuming its efficacy) was to defeat or override the pre-existing beneficial rights of Mr. Hunter, that result was an incidental consequence, but did not involve or amount to the transaction becoming that which in terms Mr. Hunter clearly did not intend, namely, an assignment to anyone, or a disposition in anyone's favour, of those beneficial rights.

I am therefore, for my part, prepared to accept the analysis of the problem put at the end of his argument by Mr. Pennycuick in the form of four questions and to accept also Mr. Pennycuick's answers to the questions. The questions and their answers are as follows: (1) Can an equitable owner of property declare trusts of the property itself? Answer: "Yes." (2) Did Mr. Hunter express himself on February 18, 1955, as declaring trusts of the shares of which he had the beneficial ownership? Answer: "Yes." (3) Is a declaration of the trusts upon which property is to be held a disposition of a subsisting equitable interest in that property? Answer: "No." (4) Is such a declaration of trust, though not itself such a disposition as mentioned in question (3), to be treated as such because it has the incidental result of overriding an existing equitable interest? Answer: "No."

In *In re Chrimes* [11] the question presented to Sargant J. was whether the plaintiff, being at the relevant time entitled to a reversionary interest under a will subject to a restraint upon anticipation, had, by a deed poll executed while she was a spinster, successfully imposed new trusts upon her reversionary interest so that she was subject when married only to such (more limited) restraint as was contained in the new trusts. The deed poll, which was addressed to all the world, took the form of a declaration that the trustees of the will should (subject to prior interests and otherwise as therein stated) hold the plaintiff's reversionary interest, in the event of her marriage, for her separate use, so that she should have full power to charge or anticipate the same subject to a certain proviso to which I need not further refer. It was conceded in argument that it was competent for one in the plaintiff's situation to defeat the restraint by an assignment of her interest while discovert: but it was contended for those impugning the validity of what the plaintiff had done that a similar result could not be achieved by a mere declaration of new or different trusts, as the plaintiff had purported to do by the deed poll.

Sargant J., in deciding for the plaintiff, said that, if the distinction above mentioned was well founded, what the plaintiff had done in any case constituted a complete assignment. But he later added [12]: "Now it is well established that in the case of "an equitable interest outstanding in trustees or other holders "a voluntary direction by the owner to the trustees or holders "to hold the whole or part of that interest upon trust for a third "person operates as a complete and effectual transfer of the "interest to which the direction extends." That was followed by a reference to (among other cases) *Tierney* v. *Wood*.[13] This passage was referred to by Upjohn J., but its use by the judge was forcefully invoked by Mr. Wilberforce as disclosing a fallacy in his reasoning. For the cited passage was, according to Mr. Wilberforce, authority for the view that a direction to trustees in relation to the trust property by one entitled by virtue of his interest in the trust property to give it, operated, necessarily, as a "transfer," in the sense of an assignment (total or partial according to the extent of the direction) of his beneficial interest.

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[11] [1917] 1 Ch. 30.

[12] Ibid. 36, 37.

[13] 19 Beav. 330.

There is no doubt that Sargant J. held, and intended to hold, that the plaintiff's deed poll in *In re Chrimes* [14] operated as an "assignment" of her reversion: and I am not to be taken as casting any doubt upon the correctness of that view. But the vital question with which we are concerned, the construction of section 53 (1) (*c*) of the Law of Property Act, was not and could not, for obvious reasons, have been in the judge's mind. Nor was the corresponding question under section 9 of the Statute of Frauds (i.e., whether such a "direction" as the plaintiff gave by declaring trusts in her deed poll required to be in writing) since it was, in fact, written. It is to be noted, too, that at the date of the deed poll the plaintiff's interest under the trusts was a limited interest, that of a reversioner, subject to subsisting life interests. She had no power to give directions to the trustees comparable to that which Mr. Hunter had on February 18, 1955. Finally, the passage cited is not entirely clear in all respects, and Mr. Wilberforce himself invited us to suppose that words to the effect "in property, the legal estate in which" had been per incuriam omitted after the words "equitable interest."

Martin's case [15] at first sight more nearly approximates to the present case. The essential facts were that Mr. Martin, having first transferred certain freehold property and the benefit of a mortgage to other persons without conferring upon them any beneficial interest (so that they held the property upon trust absolutely for himself), after a short interval, and by deed, declared trusts of the property in the trustees' hands. The relevant question was whether the second deed constituted a conveyance operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910; and that question Rowlatt J. answered affirmatively.

Again, however, the question with which we are concerned (namely, whether a direction or declaration of trust made in circumstances comparable to those of Mr. Martin amounts to a disposition of a subsisting equitable interest within section 53 (1) (*c*) of the Law of Property Act) did not, of course, arise. Rowlatt J. held the declaration to have operated as a voluntary disposition within section 74 of the Finance (1909–10) Act, 1910; and, as I have earlier stated, it is conceded in the present case that if the operation of the relevant trusts must be related to the instruments of March 25, 1955, those instruments are likewise chargeable with ad valorem duty. *Martin's* case [15] does not, in my judgment, assist the Crown in the present case.

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[14] [1917] 1 Ch. 30.

[15] 15 A.T.C. 631.

Upjohn J. referred also in his judgment to his own earlier decision in *In re Wale, decd.*,[16] as having been relied upon before him by the Crown. The question in *In re Wale* [16] was, however, widely different from that before us. The present question was not at all raised. It is sufficient for me to say that, once again, nothing in *In re Wale* [16] assists the solution of the present problem.

That problem must indeed be determined, as I have said, as a matter of principle uncovered by any authority. It is, whether the directions given on February 18, 1955, amounted in law to a disposition of a subsisting interest within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925. In the end of all it depends, briefly and simply, upon the significance in the context of that subsection of the word "disposition." The section reproduces sections 3, 7, 8 and 9 of the Statute of Frauds which were, by the Act of 1925, repealed. Paragraph (*b*) of the Law of Property Act subsection follows fairly closely the terms of the repealed section 7 of the Statute of Frauds. On the other hand, the language of paragraph (*c*) in the Act of 1925 departs substantially from that of section 9 of the Statute of Frauds, which reads (so far as relevant): ". . . all grants, and assignments of "any trust or confidence shall likewise be in writing . . . or else "shall . . . be utterly void and of none effect."

If the present question had arisen for determination under section 9 of the Statute of Frauds, it is, in my judgment, reasonably clear that it would have been answered in the same sense as in Upjohn J.'s judgment: for the transactions of February 18, 1955, could not, to my mind, have been sensibly described as constituting, or operating as, a grant or assignment of a trust or confidence—particularly bearing in mind the established law that a trust of personalty could be effectively declared by parol. Has the law been altered by the replacement of section 9 of the Statute of Frauds by section 53 (1) (*c*) of the Law of Property Act? No doubt, as Mr. Wilberforce observed, proper effect must be given to a change of language, even though the expressed purpose of the new enactment be that of consolidation only of the existing law: see Craies on Statute Law, 5th ed. (1952), at pp. 333 et seq. Still, in such a case, the court may, in my judgment, properly prefer that interpretation, if fairly open, which more closely reflects the scope of the replaced enactment; and more particularly, perhaps, where, as in the present case, the language of the repealed statute might in modern times appear somewhat archaic.

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[15] (1930) 15 A.T.C. 631.

[16] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280.

Upjohn J. pointed out at the end of his judgment that the word "disposition" is one of wide import, general rather than precise. Many contexts could no doubt be found in which the word or its derivatives would cover any means whereby the owner of any right or property succeeded in getting rid of that which he formerly enjoyed. But if the word bears this widest significance, then does the validity of a parol declaration of trust of personalty now survive? As Upjohn J. observed, if the section has worked such a change in the law, it has not been noticed in any of the well-known textbooks. The meaning of the word must be discerned from and, as I think, limited by the context of the succeeding words "subsisting at the time of the disposition." It is said that the presence of these words is apt to save the parol declaration of trust. But in the case at any rate of such a declaration by one who is the owner beneficially of property, the legal estate in which is vested in another as trustee for him—what is referred to in the American Restatement (1935) "Trusts" edited by Professor Austin Scott of Harvard University, as "sub-trusts"—the practical effect would seem, in common sense, to amount, or to be capable of amounting, to the "getting rid of" a trust or equitable interest then subsisting. If, therefore, the word "disposition" ought in its context to be so limited as to exclude such a declaration, it should also in my judgment (having due regard to the pre-existing law and to the characteristics of equitable rights or interests to which I have earlier referred) be construed so as not to cover a transaction such as the present which, though it may result in the destruction or defeasance of subsisting equitable rights, is not in form or (as I think) in reality apt or directed to constitute any dealing with those rights.

It remains for me to say something of the judgment of Upjohn J. with which I am respectfully in agreement. The judge thus expounded his conclusion: "In my judgment a direction to "trustees to hold trust property upon trust for a donee operates "as a transfer of the equitable interest to the donee by way of "trust and not by way of assignment." Elsewhere the judge similarly uses the word "transfer," which may have been derived from its use by Sargant J. in the passage above quoted from

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In re Chrimes.[17] The use was seized upon by Mr. Wilberforce as indicating that Upjohn J. had in some sense misapprehended the essential point for his decision. But I agree with Mr. Pennycuick that in its context the judge used the word in a special sense indicating that the equitable rights had in effect been displaced or transposed, and meaning something wholly distinct from "disposition" in the sense of an assignment or direct dealing with an interest, the defined identity of which survives, recognizably, the dealing. So much, indeed, clearly appears from the final words of the passage from the judgment which I have quoted. Any other view would be wholly destructive of the reasoning and logic of the judgment.

For the reasons which I have tried to state, I would, if the matter rested with me, dismiss the appeal. But my brethren, whose judgments I have had the advantage of reading in advance, have reached an opposite conclusion. The sole essential question is, as I have more than once said, an extremely short one. As my brother Morris L.J. observes in his judgment, what Mr. Hunter did and intended to do on February 18, 1955, was neither an assignment by him of his beneficial interest, nor a declaration of trust of that interest. It was a direction to the trustees which, by reason of the power to direct, which he had, put an end to his beneficial rights. Was it, therefore, a disposition by him of an equitable interest subsisting at the time of the disposition? That is the one question which can be shortly and simply stated. I would answer the question negatively, but my brethren think that it should be answered affirmatively. In the result, the appeal must be allowed.

MORRIS L.J. (read by Lord Evershed M.R.). This is an appeal from the judgment of Upjohn J., whereby he allowed an appeal by way of case stated under section 13 of the Stamp Act, 1891, from assessments to ad valorem duty made by the Inland Revenue Commissioners in respect of six instruments each made on March 25, 1955, and each called a declaration of trust. The commissioners were of opinion that each of the instruments was a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910.

[His Lordship referred to the facts set out in the case stated, reading the terms of the declarations of trust of March 25, 1955, as follows:] In each one the opening words are as follows: "This declaration of trust is made March 25, 1955, by . . . [the "trustees]." Each then recited that prior to February 18, 3,000 shares were held as nominees for and to the order of Mr. Hunter. There was a recital of what had been done on February 18 with the assertion that the direction given "did immediately result in "the entire exclusion of Mr. Hunter from all future right title "and benefit to or in the said shares or any of them and the "income thereof." After further recitals the deed continued: "Now this deed witnesseth and the trustees hereby acknowledge "and declare that they have been since the date of inception and "are now holding the said shares specified in the said schedule "hereto and the income thereof upon such trusts and with and "subject to such powers and provisions as are by and in the said "settlement declared and contained concerning the trust fund as "therein defined or such of the same trusts powers and provisions "as are now or may hereafter be subsisting or capable of taking "effect to the intent that the said shares should since the date "of inception form an addition to and be one fund with the said "trust fund for all purposes.

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[17] [1917] 1 Ch. 30.

"In witness whereof the trustees and Mr. Hunter have hereunto set their hands and seals the day and year first above "written."

It is common ground that if what took place on February 18 had the result that thereafter the six blocks of 3,000 shares each were held by the trustees on the trusts declared by the six respective trusts, then no property passed in and by the six "declarations of trust" of March 25, and those instruments would not be chargeable to ad valorem stamp duty. The commissioners submit that the directions of February 18 were ineffective for the reason that they were oral and not in writing. The commissioners submit that the provisions of section 53 (1) (*c*) of the Law of Property Act, 1925, were applicable.

It thus comes about that, though the direct matter for determination is whether the six instruments of March 25 should be assessed to ad valorem stamp duty, the principal issue which arises is whether the provisions of section 53 (1) (*c*) of the Law of Property Act prevented the directions given on February 18 from being effective. If those provisions did not so prevent then no further question now arises and the appeal fails. Before the judge a submission was alternatively made by the commissioners to the effect that the oral directions on February 18 and the subsequent deeds executed on March 25 should be taken and read together. That submission failed and has not been made in this court.

If the provisions of section 53 (1) (*c*) rendered what took place on February 18 ineffective, then the question arises whether the instruments of March 25 were chargeable with ad valorem duty.

Section 74 (1) of the Finance (1909–10) Act, 1910, is in the following terms: "Any conveyance or transfer operating as a "voluntary disposition inter vivos shall be chargeable with the "like stamp duty as if it were a conveyance or transfer on sale, "with the substitution in each case of the value of the property "conveyed or transferred for the amount or value of the con-"sideration for the sale:

"Provided that this section shall not apply to a conveyance "or transfer operating as a voluntary disposition of property to a "body of persons incorporated by a special Act, if that body is by "its Act precluded from dividing any profit among its members "and the property conveyed is to be held for the purposes of an "open space or for the purposes of its preservation for the benefit "of the nation."

Part V of the Act of 1910 (which part contains section 74) is to be read as one with the Stamp Act, 1891 (see section 96 (5) of the Act of 1910).

Section 62 of the Stamp Act, 1891, is in the following terms: "Every instrument, and every decree or order of any court or of "any commissioners, whereby any property on any occasion, "except a sale or mortgage, is transferred to or vested in any "person, is to be charged with duty as a conveyance or transfer "of property:

"Provided that a conveyance or transfer made for effectuating "the appointment of a new trustee is not to be charged with any "higher duty than ten shillings."

Section 54 of the Stamp Act, 1891, is in the following terms: "For the purposes of this Act the expression 'conveyance on sale' "includes every instrument, and every decree or order of any "court or of any commissioners, whereby any property, or any "estate or interest in any property, upon the sale thereof is trans-"ferred to or vested in a purchaser, or any other person on his "behalf or by his direction."

From a citation of these sections it becomes clear that there may be a wide range of instruments which become chargeable with duty as conveyances or transfers of property.

The issue which arises calls for an analysis of what took place on February 18. That is necessary in order to decide whether section 53 of the Law of Property Act applies. That section took the place of sections 3, 7, 8 and 9, of the Statute of Frauds, and subsection (1) (*c*) provides as follows: "a disposition of an "equitable interest or trust subsisting at the time of the disposi-"tion, must be in writing signed by the person disposing of the "same, or by his agent thereunto lawfully authorized in writing "or by will."

Section 205 (1) (ii) contains the following definitions: "'Con-"'veyance' includes a mortgage, charge, lease, assent, vesting "declaration, vesting instrument, disclaimer, release and every "other assurance of property or of an interest therein by any "instrument, except a will; 'convey' has a corresponding "meaning; and 'disposition' includes a conveyance and also a "devise, bequest, or an appointment of property contained in a "will; and 'dispose of' has a corresponding meaning."

There is no doubt that between February 1 and February 18 Mr. Hunter owned the equitable interest in the 18,000 shares. On February 18 he directed the trustees to hold the shares thenceforth in a different way. Instead of holding them for him the trustees were to hold them upon the trusts and with and subject to the powers and provisions declared by and contained in certain settlements.

It has therefore first to be considered what exactly it was that Mr. Hunter did or purported to do on February 18. Did he purport to effect a direct assignment of his existing equitable interest to some third party or parties? It seems to me that he did not. Did he purport to declare himself a trustee for others of his existing equitable interest? Again it seems to me that he did not. Nor did he enter into any contract for valuable consideration to assign his equitable interest to some third party. What he did was to direct the trustees that for the future they were to hold the trust property not for him but on certain trusts which he declared: his equitable interest was to be completely determined.

It is well-established law that a declaration by parol is sufficient to create a trust of personal property (see *M'Fadden* v. *Jenkyns*,[18] *Milroy* v. *Lord* [19]). But the only question which now arises relates to an equitable interest or trust which was subsisting in Mr. Hunter before he gave his oral directions to his trustees on February 18. The limited issue is whether there was a purported "disposition" of Mr. Hunter's interest. If there was then it was ineffective or unavailing for lack of writing.

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[18] 1 Phillips 153.

[19] (1862) 4 De G.F. & J. 264.

Mr. Wilberforce submitted that the owner of a subsisting equitable interest, the legal estate being vested in trustees, could make a settlement or trust of that equitable interest by assigning it to trustees to be held upon the new trusts: Mr. Wilberforce further submitted that, if instead of appointing new trustees, the owner directed the existing trustees, who held the legal estate, to hold upon the new trusts, the effect and result of this would be that there would be an assignment to the trustees, the direction being a form of equitable assignment. On this view Mr. Hunter's words on February 18 would have been ineffective had the governing statutory provision been section 9 of the Statute of Frauds.

Out of a wealth of citation of authority no case emerges in which the present point has arisen for decision either under section 9 of the Statute of Frauds or under section 53 of the Law of Property Act.

In *Bentley* v. *Mackay*[20] no point seems to have been taken in regard to section 9 of the Statute of Frauds. Neither was any point taken in *M'Fadden* v. *Jenkyns*,[21] though that case related rather to the creation of a trust than to any dealing with an existing equitable interest. In *Martin* v. *Inland Revenue Commissioners*,[22] much relied on by Mr. Wilberforce, no point arose comparable with that now in issue. As section 53 of the Law of Property Act, 1925, is the section which now applies, the issue involved is whether Mr. Hunter purported to dispose of his interest. The word "disposition" must be given a normal meaning. The legislature chose to use this word in the new statute. Mr. Wilberforce placed reliance upon some words used by Sargant J. in his judgment in *In re Chrimes*.[23] In speaking of a direction given by the owner of an equitable interest to trustees in whom the legal estate is outstanding Sargant J. said[24]: "A voluntary direction by the owner to the trustees or "holders to hold the whole or part of that interest upon trust "for a third person operates as a complete and effectual transfer "of the interest to which the direction extends." I cannot, however, regard those words as decisive of the present problem.

Mr. Hunter was certainly in a position to declare a trust (as was the case in *Tierney* v. *Wood*[25]). In *Rycroft* v. *Christy*,[26] Lord Langdale M.R., in reference to directions given by a beneficiary, said,[27] "she transferred the trust from herself to the "object she desired to be benefited." The notion of a transfer of the equitable interest is involved both where transfer takes place by way of assignment and where it takes place by way of direction to trustees to hold on trust for a donee or donees. But whatever language may be employed in cases where general principles have been under consideration the short question which here emerges is whether what Mr. Hunter did purported to amount to a "disposition" by him. The word "disposition" is a word of wide signification. Before February 18 Mr. Hunter possessed a subsisting equitable interest in the shares: his purpose and object when he gave his oral direction was to deprive himself immediately and irrevocably of his subsisting personal beneficial interest so that others could and should become beneficially entitled. It was a necessary part of his purpose that he should deal with his personal interest: he terminated it and informed his trustees that they should no longer hold for him but should hold on the substituted trusts which he declared. I cannot resist the conclusion that this was a purported "disposition" by him of his interest. In *Inland Revenue Commissioners* v. *Buchanan*,[28] a question arose whether a surrender is a disposition. Lord Goddard C.J. said [29]: "I think it clearly is a "disposition. A person can dispose of his interest in a fund or "in a chattel or in anything else in a variety of ways, but if, "having an interest in a fund, although the interest may not "then be in possession, he surrenders that interest, it seems to "me that he disposes of that interest."

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[20] (1851) 15 Beav. 12.

[21] 1 Phillips 153.

[22] 15 A.T.C. 631.

[23] [1917] 1 Ch. 30.

[24] Ibid. 36.

[25] 19 Beav. 330.

[26] (1840) 3 Beav. 238.

[27] Ibid. 241.

I consider that Mr. Hunter purported to effect a disposition but that by reason of section 53 his oral words on February 18 were ineffective. The instruments of March 25 were, however, made operative and effective by the parties thereto and were in my judgment chargeable to ad valorem duty as assessed by the commissioners. It is with a natural diffidence that I differ from the opinions of my Lord and of the judge, but I feel constrained to the view which I have expressed and I would allow the appeal.

ORMEROD L.J. I agree with Morris L.J. that this appeal should be allowed. [His Lordship referred to the facts and continued:] It is agreed that the question upon which the appeal turns is whether in the course of the transaction of February 18 the settlor made a disposition of his subsisting equitable interest within the meaning of section 53 (1) (c) of the Law of Property Act, 1925. There can be no doubt that up to the moment of the

[28] Ante, 289; [1957] 2 All E.R. 400; 37 T.C. 365.

[29] Ante, 289, 296.

oral direction being made there was a subsisting equitable interest in the shares vested in the settlor. At that moment the equitable interest ceased to be vested in him. Either it was transferred from him to the trustees for them to hold the shares in trust for the beneficiaries or it ceased to exist and a new equitable interest was created in the terms of the direction. If what took place was a transfer of the settlor's interest, then it could not be argued that it was not a disposition within the meaning of the section. I do not think, however, that it was a transfer. It was certainly not in my judgment a transfer which was in the nature of an assignment. The more difficult question is whether the transaction was a " disposition " in spite of the fact that it should not be regarded as a transfer. Mr. Pennycuick has argued that the purpose of what took place on February 18 was that the settlor should give directions to the trustees as to the trusts upon which and the persons for whom they should hold the shares, that the cessation of the settlor's interest was an incidental consequence of this purpose and that he neither intended to effect a disposition of his interest, nor did he in fact do so. I may say at once, that I find it difficult to accept that argument.

I have found little or no assistance from the authorities that have been cited. It is true that Romer L.J. in *Timpson's Executors* v. *Yerbury*[30] says: " Now the equitable interest in " property in the hands of a trustee can be disposed of by the " person entitled to it in favour of a third party in any one of " four different ways," and goes on to specify as one of these ways a direction to the trustees to hold the property in trust for a third party. But the question of the construction of section 53 (1) (*c*) had not arisen in the case, and for my part I do not regard this passage as of assistance in the present case.

The question is whether the word " disposition " should be given the wide meaning that it would seem to have in normal everyday usage, or whether it should have a meaning so restricted as to make section 53 (1) (*c*) of no wider import than section 9 of the Statute of Frauds. That section requires that " all grants " and assignments of any trust or confidence shall likewise be in " writing." If the meaning of the word " disposition " is to be restricted to " grants and assignments," then the case would not in my judgment be within the section.

Mr. Pennycuick has argued that section 53 (1) (*c*) was a consolidation of the existing law and was in effect a re-enactment of section 9 of the Statute of Frauds, and should not be given a wider meaning unless there was a clearly expressed intention that such a meaning should be so given. Mr. Wilberforce, on the other hand, argued that effect must in any event be given to a change of language and that the language of the new section might well be intended to bear a wider construction than the old one, particularly having regard to the change which has taken place in the nature of equitable interests since the passing of the Statute of Frauds. Giving full consideration to the argument that the section is to a large extent a consolidation of the existing law, I have come to the conclusion that the wider construction of the section is the right one. If the intention had been to limit its operation to grants and assignments, I see no reason why the section should not have read "a grant or assignment of an "equitable interest or trust subsisting at the time of the grant "or assignment." The section, however, does not so read. The word "disposition" has been used, and, in my judgment, this word should be given its normal meaning. If this be right there can, I think, be little doubt that the case comes within the section, and the transaction is void for want of writing.

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[30] [1936] 1 K.B. 645, 664.

It must be looked at, not from the point of view of the new interest which was to be vested in the trustees, but from that of the interest which was vested in the settlor up to the time of the direction being given. This was an interest which he had himself created, apparently for the purpose of being in a position to give the appropriate directions to the trustees at a later date. In order to do this effectively, it was essential that the equitable interest should be vested in him and that it should cease to exist at the time and by reason of the direction. The transaction therefore was one which was, in my judgment, a "disposition" within the meaning of the section of the settlor's equitable interest. He "disposed" or "got rid" of it, by causing it to cease to exist in carrying out the purpose for which he brought it into being.

It follows, in my judgment, that the transaction of February 18 was void and that the declaration of trust of March 25, 1955, is liable to be stamped ad valorem.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Inland Revenue; Soames, Edwards & Jones.*

E. D.

1957
Oct. 8, 9,
10, 11, 22,
23, 24, 25,
28, 29, 30;
Nov. 4, 19.

Wynn-Parry J.

In re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD.

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged—Whether proper law of contract or lex situs of debt applicable.

Conflict of Laws—Chose in action or debt—Discharge.

Conflict of Laws — Contract — Proper law — Lease of movables — Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. In 1921 it bought rolling stock worth $14,000,000 and decided to raise part of that sum in the United States of America under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the United States a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee the rolling stock for a period of 15 years for a rental payable twice yearly at the office of the trust company in Philadelphia. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the lease forming security for those payments.

By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain decrees enacted for the purpose, acquired the management and control of the U. Company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the U. Company from all responsibility in respect of liabilities arising under the trust certificates. On March 4, 1954, the U. Company went into voluntary liquidation and the successor of the trust company as trustee for the certificate holders lodged a proof, claiming the instalments that were payable under the lease. On appeal from the liquidators' rejection of the proof:—

Held, (1) that, even though the debt claimed had emerged from the contract and achieved a separate existence situate in Cuba, the proper law to apply in determining whether the obligation of the company under the lease was still subsisting or had been discharged was the proper law of the contract and not the lex situs of the debt due and payable arising under it.

In re Claim by Helbert Wagg & Co. Ltd. [1956] 1 Ch. 323; (sub nom. *In re Helbert Wagg & Co. Ltd. In re Prudential Assurance Co. Ltd.*) [1956] 1 All E.R. 129 considered.

F. & K. Jabbour v. *Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145 distinguished.

Dictum of Lord Esher M.R. in *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399, 405; 6 T.L.R. 393 applied.

(2) That the proper law of the lease and the contemporaneous agreement was that of Pennsylvania; that since, according to the law of Pennsylvania, the obligations of the U. Company under the lease were continuing, the trust company could prove in the liquidation for a sum sufficient to satisfy the proper claims of the certificate holders.

ADJOURNED SUMMONS.

By this summons the Pennsylvania Co. of Banking and Trusts, claiming to be a creditor of the United Railways of the Havana and Regla Warehouses Ltd. (in voluntary liquidation), applied for an order that the liquidators' rejection of the applicant's proof be reversed and that the proof be admitted in full. The following is a brief summary of the facts which appear in full in the judgment.

On August 2, 1898, the United Railways of the Havana and Regla Warehouses Ltd. was incorporated in England. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connexion with that undertaking. Before and during 1921 the company purchased rolling stock, consisting of locomotives and cars, to the value of $14,000,000. To finance part of this sum it was decided to raise $6,000,000 in the United States of America under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through a trust company, the Commercial Trust Company of Philadelphia, a corporation of the Commonwealth of Pennsylvania. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation called the Cuba Rolling Stock Co., which was a subsidiary of the company. On March 25, 1921, the company sold the rolling stock to the subsidiary. By a lease dated April 18, 1921, and executed in New York, the subsidiary as lessor leased to the company as lessee, the rolling stock for a period of 15 years for a rental payable twice yearly at the offices of the trust company in Philadelphia, these rentals being to provide principal and interest reserved by the trust certificates, the lease forming security for those payments. At the same time as the lease was executed, there was executed in New York an agreement whereby the subsidiary assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary resold the rolling stock to the company "subject "to and with the benefit of the lease and the agreement." From February 14, 1931, the company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain law decrees enacted for the purpose, acquired the management and control of the company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the company from all responsibility in respect of liabilities arising under the trust certificates. On March 4, 1954, the company went into voluntary liquidation, and the successors to the Commercial Trust Company of Philadelphia, the applicants in the present case, as trustees for the certificate holders, lodged a proof, claiming the instalments that were payable under the lease. The liquidators rejected the proof and the applicant appealed.

R. O. Wilberforce Q.C. and *T. D. D. Divine* for the applicant. The applicant's main head of claim is by virtue of the covenant contained in the lease. The first question is whether under Cuban law any novation was effected. One is looking for a provision in Cuban law which brings about novation of an agreement against a railway company, and no such provision can be found in the Military Order of 1902. Secondly, if there was a possible novation under Cuban law, did it extend to this particular claim, that is, the claim by the trustee under the lease? That question turns on construction of the document. One should interpret the words of the preliminary agreement and the deed of sale not in a minutely technical sense by going into doctrines concerning the situation of the debt but in a business sense. Are the words apt to include a debt owing in respect of equipment trust certificates? They only refer to Cuban creditors who have claims arising out of the operation of the railway. It is submitted that there was no novation at all, because there is no provision in the Cuban legislation for novation. In any case, there was no novation of this particular debt, because (a) on the natural construction of the words "outstanding in Cuba" and represented by debts "arising from the operation of these properties," this debt does not come within these words; (b) "outstanding in Cuba" relates to the situs of the debt and it was not situate in Cuba; (c) it is personal property and therefore, under the Cuban Civil Code, not governed by the lex situs but by the personal law of the person to whom it is payable, i.e., the law of the United States of America. Thirdly, assuming Cuban law permitted novation of this debt, is such novation one which can take place in law and on English principles of private international law? One must ascertain the proper law of the obligation to ascertain whether this debt can be novated by Cuban law, it being understood that novation involves a discharge of one creditor in substitution for another. The proper law is also relevant for the consideration of whether the moratorium laws apply.

A contract can only be discharged according to the proper law of the contract: Dicey's Conflict of Laws, 6th ed., p. 651; *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* [1]; Cheshire's Private International Law, 5th ed., p. 246, and Wolff, Private International Law, 2nd ed., p. 458. The proper law is to be applied here because we are concerned with an obligation arising under a bilateral contract containing a number of mutual obligations some of which were continuing in effect up to the date of sale. We are not here dealing with a bare debt. The proper law of this obligation on the part of the company to pay money under the lease to the trustee is the law of the United States of America and in particular the law of the Commonwealth of Pennsylvania. To ascertain the proper law one must look at the surrounding circumstances: *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft.*[2] As to clause 12 of the lease, concerning submission to the jurisdiction, Dicey's Conflict of Laws, 6th ed., p. 589, is too strong. [On this point reference was made to *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co. Ltd.*,[3] *per* Lord Dunedin; Wolff, Private International Law, 2nd ed., p. 437, and *The Fehmarn.*[4]] The fact that disputes are submitted to particular courts does not prevent actions being brought elsewhere; and the question of the proper law is independent of the question of the forum. There is a distinction in principle between a submission to courts and a submission to arbitration.

The fact that the undertaking was in Cuba and that the equipment was in Cuba is only one factor. The thing that really matters is the financing and loan of some $6,000,000, that is,

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[1] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[2] [1937] A.C. 500; [1937] 2 All E.R. 164.

[3] [1927] A.C. 604, 608; 137 L.T. 458.

[4] [1957] 1 W.L.R. 815; [1957] 2 All E.R. 707.

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UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD., *In re.*

the raising and repayment of money which took place in the United States of America. The fact that it was secured by a lease in Cuba is subsidiary. Looking at the way the documents were drafted, it is clear that the parties intended the law of the United States to apply to this obligation. The proper law also deals with the right of a country to modify the obligations to pay by means of a moratorium: Cheshire's Private International Law, 5th ed., p. 147. In *In re Claim by Helbert Wagg & Co. Ltd.*[5] there was a debt which was not due and accrued when the moratorium was passed. The applicant comes within the *Helbert Wagg*[6] principle as to moratorium laws because enough of the debt was in futuro at the relevant date. Therefore there is no need to go outside that case to show that the moratorium law does not apply. If the proper law of the obligation is United States' law, the moratorium law cannot interfere with payment. If situs is relevant, the matter must be approached on the principle that the place of the payment is the situs of the debt.

To summarize: the claim for breach of covenant is not affected by Cuban legislation as regards novation; it is not affected by the moratorium law. The claim in respect of the covenant, whether a covenant under the lease or a personal unsecured covenant, is not affected by Cuban law. This is a claim under the covenant in the lease, and, whether treated as a claim for rental or a personal unsecured liability, it is not affected by Cuban law because Cuban law does not provide for novation of any debts against this company. Even if it did, this particular debt does not fall within the description of debts novated. Even if it did, the proper law is not Cuban law, therefore Cuban law has no effect.

John Megaw Q.C. and *Richard Hunt* for the liquidators. The proper law of a contract is not relevant on the question whether or not a debt arising out of the contract and due and payable has been extinguished, except in so far as the ascertainment of the proper law may throw some light on the situs of the debt. The fact that a debt arises out of a contract is purely history; once it is due and payable it is a chose in action with a separate existence, and the fact that there are other terms of the contract which are executory is irrelevant. If the debt can be sued for, the lex situs of the debt must be applied in order to determine whether it has been discharged or not: Bovill C.J. in *Ellis* v. *M'Henry.*[7] "A debt or liability arising in any country" means a debt or liability situate in any country: Bankes and Scrutton L.JJ. in *Swiss Bank Corporation* v. *Boëhmische Industrial Bank.*[8] The principle of *Ellis* v. *M'Henry*[9] is that one must look to the situation of a foreign debt to see if the law of the foreign country is applicable. Where the debt due or payable is affected by foreign legislation, one looks to the lex situs. In *In re Claim by Helbert Wagg & Co. Ltd.*[10] Upjohn J. held that he must look to the proper law of the contract, not the lex situs of the debt, for the following reason: if the liability is a liability to pay at a date *after* the date of the relevant legislation, then one looks to the proper law of the contract; but by necessary inference, if the debt has already become payable so that it can be sued for before the date of the legislation, then one looks to the situs because the debt has obtained a local situation. A debt is a chose in action which is property with an existence of its own, and the question of the validity or applicability of foreign law transferring that property is a question of situs, as in the case of foreign law transferring a chattel. The trustees say that situs may be relevant even though a debt arises under the contract, but only where the contract is completely executed; if it is not executed and any obligation remains apart from accrued liability to pay, then the proper law of the contract applies. That distinction is wrong in principle; there is no authority supporting it. The only case cited to support it, *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux,*[11] does not support or seek to draw any such distinction. The question what is the source of the debt is irrelevant. Liability may arise by operation of law, contract or statute; the fact that a debt arises out of a contract is for this purpose a matter of history. Once a debt is a chose in action it is separate from the contract out of which it arises, even though the contract may have other executory provisions. The principle is stated in *In re Russian Bank for Foreign Trade,*[12] *In re Banque des Marchands de Moscou (Koupetschesky)*[13] and *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property.*[14] A debt which has become an accrued obligation and can be sued for has a local situs in the same way as a chattel. The law which governs questions of title to the debt (for example, as to compulsory transference of liability) is the law of the situs of the debt, just as, in general, questions as to transfer of, or extinguishment of, title to a chattel are governed by the lex situs of the chattel at the relevant time.

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[5] [1956] 1 Ch. 323; [1956] 1 All E.R. 129.

[6] [1956] 1 Ch. 323.

[7] (1871) L.R. 6 C.P. 228, 234.

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[8] [1923] 1 K.B. 673, 678, 681; 39 T.L.R. 179.

[9] L.R. 6 C.P. 228.

[10] [1956] 1 Ch. 323.

[11] 25 Q.B.D. 399.

[12] [1933] Ch. 745.

[13] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[14] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

The relevant date for the purpose of ascertaining the situs of the debt is the date at which the foreign law became operative: *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou*,[15] referred to by Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.*[16] So one must ascertain the residence of the company in 1953 because the situs will depend on residence at that date. The situs is to be decided by applying principles of English private international law. Where the debtor is not resident in the place of contractual payment, but has more than one residence, one takes as the situs of the debt the residence with which the debt is most connected: *New York Life Insurance Co.* v. *Public Trustee*,[17] *per* Pollock M.R.[18] The case is important because it shows the principle on which the situs is selected where the debtor has more than one place of residence. The test is the place where the debt is primarily recoverable. Therefore, where the debtor is not resident in the place of payment, one must choose between two other residences by reference to the place where the debt is primarily recoverable. Dicey's Conflict of Laws, 6th ed., p. 304, conflicts with the judgment of Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.*,[19] and Cheshire's Private International Law, 5th ed., does not deal directly with the point.

The proper law of the contract out of which the debt arises is not relevant to the question of extinguishment or the compulsory transfer of a debt. The proper law cannot make " A " the situs if the debtor is not resident in " A." In the present case the facts are that in 1953 the company had no residence in the United States of America (the contractual place of payment being New York or Pennsylvania), but it had a residence in Cuba and a residence in England. In accordance with the propositions stated above, the court, to determine the situs of the debt, has to decide with which of these two countries the debt is most closely connected. The debt is most closely connected with Cuba, being the country in which, once the United States is out of the picture because of lack of residence there at the relevant date, the debt would primarily be sued for and recoverable: see, for example, clause 12 of the lease. Therefore, the law to be applied is Cuban law.

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[15] Unreported, C.A., 1931.

[16] [1956] 1 Ch. 323, 329.

[17] [1924] 2 Ch. 101; 40 T.L.R. 430.

[18] [1924] 2 Ch. 101, 111, 112.

[19] [1956] 1 Ch. 323.

In any event, even if those propositions are wrong, so that the proper law of the contract is the relevant law, the proper law of the contract is also Cuban law. The proper law of the contract must be ascertained on English principles of private international law. There is an express intention in clause 11 of the lease that Cuban law shall govern. This is conclusive. Moreover, in the absence of an express indication of intention to the contrary, an arbitration clause is conclusive; and a clause containing a submission by the parties to the jurisdiction of the courts of a particular country is, if not conclusive, at least a strong indication that the law of that country shall govern the contract: *per* Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* [20]; Dicey, 6th ed., p. 589, and Cheshire, 5th ed., p. 215. In the *James Finlay* case [21] Lord Dunedin's use of the word "forum" covers not only an arbitration clause but equally a clause submitting to the jurisdiction of a particular court, or the courts of a particular country.

There are various other indications that the proper law of the contract is Cuban law; for example, the contract deals with a lease of property in Cuba. If rolling stock is immovable property under Cuban law (and the question whether property is movable or immovable must be decided by reference to its situs), this is a further strong indication that a contract relating to it is governed by Cuban law. Assuming that Cuban law is applicable, either because the lex situs is Cuban or the proper law is Cuban, the question whether Cuban law transferred liability away from the company upon and consequently on the sale is a matter of Cuban domestic law and not Cuban rules of private international law.

Wilberforce Q.C. in reply. Mr. Megaw said that the law governing discharge of a debt is the lex situs, i.e., the residence of the debtor. That leads to the odd proposition that the law changes as the debtor changes his residence at will. The fallacy is to say that where a money debt is due you can take it out of the contract and give it an independent life of its own. That asset is assignable and may have a separate existence of its own, but the creditors' only right to recover it lies in the contract. Here the debt is particularly bound up with the contract because the final amount due from the company depends on the number

[20] [1894] A.C. 202, 212; 10 T.L.R. 479.

[21] [1927] A.C. 604, 608.

of certificates outstanding. It is ascertained by looking at the contract, and it is indissolubly bound up with it.

As to the nature of the obligation of the debtor after the official date when the lease came to an end, see *Ellis* v. *M'Henry*,[22] which was clearly a proper law case and was so treated by Dicey in his Conflict of Laws, 6th ed., p. 653. *Swiss Bank Corporation* v. *Boëhmische Industrial Bank*,[23] cited by Mr. Megaw to show that the lex situs is the governing law and that *Ellis* v. *M'Henry* [24] was a situs case, is an example of a title case because of the garnishee order. Dicey regarded it as a question of jurisdiction. It is a case where, the situs being in England and the proper law being English, the proper law and the situs coincide. In *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [25] the comment of Pearson J.[26] on *Perry* v. *Equitable Life Assurance Society of the United States of America* [27] is purely negative and does not weaken my proposition that one must look to the proper law of the contract. *Metliss* v. *National Bank of Greece and Athens S.A.*[28] is helpful on two points, namely, moratorium and novation and the proper law. In that case English law was the proper law of the contract and the plaintiff recovered on the basis of universal succession. It is a case of novation or nothing. It was held that the moratorium did not apply because the proper law was English.

As to the transfer of a chattel, the lex situs may govern, but novation is not transfer. It is agreed that the relevant date is the date of the foreign legislation and that the lex situs of a debt is determined by English private international law.

Clause 12 of the lease, in which the parties submit themselves to the courts of Havana, is not a general clause but a very narrow clause. All the cases cited by Mr. Megaw on this point are distinguishable. The question whether the contract was more closely connected with Cuba than elsewhere depends on the weight that a judge gives to the clause. The fact that the property was situate in Cuba is irrelevant because here a money debt is being considered. Mr. Megaw submits that the proper law is Cuban law. If it is, it is conceded that it applies. But he has not established that the debt is properly recoverable in Cuba. He relies on clause 11 as expressing an intention that the law of Cuba should govern the contract, and he relies on the dictum of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery.*[29] That is a very narrow decision on that particular arbitration clause, and which law governed that particular clause.

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[22] L.R. 6 C.P. 228.

[23] [1923] 1 K.B. 673; 39 T.L.R. 179.

[24] L.R. 6 C.P. 228.

[25] [1954] 1 W.L.R. 139.

[26] Ibid. 156.

[27] (1929) 45 T.L.R. 468.

[28] [1957] 2 Q.B. 33; [1957] 2 All E.R. 1; affirmed H.L. (sub nom. *National Bank of Greece and Athens S.A.* v. *Metliss*) [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

Cur. adv. vult.

November 19. WYNN-PARRY J. read the following judgment: United Railways of the Havana and Regla Warehouses Ltd., to which I will refer as "the company," was incorporated in England on August 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connexion therewith. Prior to and during 1921 the company purchased rolling stock, consisting of locomotives and cars, to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, which, as the name suggests, is an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. What was done was this. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Co. (to which I will refer as "the car company"). The car company was a subsidiary of the company. It is the use of this company in the manner which I will describe, which constitutes the variation from or addition to the Philadelphia Plan to which I have referred. On March 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated April 11, 1921, which is described as a bill of sale before a notary public in New York. On April 18, 1921, a document, described therein as a lease and agreement, to which I shall refer as "the lease," was executed between the car company as lessor and the company as lessee. The lease was executed in New York before a notary public by attorneys in fact for the car company and the company respectively. The attorney in fact for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on February 3, 1921.

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[29] [1894] A.C. 202, 212.

The recitals to the lease, so far as material, read as follows: "Whereas, the lessee has power under its charter and the laws "of the Republic of Cuba and the Acts of the United Kingdom "of Great Britain and Ireland to enter into and perform this "agreement, and has taken all necessary corporate action to "authorize the execution and delivery hereof. And whereas, "at the time of the execution hereof the lessor holds contracts "for the construction and acquisition of, or is the absolute owner "of, the railroad equipment and/or rolling stock hereinafter "described, and has agreed to deliver forthwith or as soon as the "same shall be completed, such railroad equipment and/or "rolling stock to the lessee, which agrees to receive the same, "such delivery by the lessor and acceptance hereof by the lessee "to be upon the terms and under the conditions herein set forth: "And whereas, the lessor desires, upon the execution hereof, and "in the manner hereinafter set forth, to assign, transfer and set "over to the Commercial Trust Company of Philadelphia, as trustee all the lessor's right, title and interest in and to this "lease and the rents reserved hereunder, and in and to the railroad equipment and/or rolling stock hereby demised. And "whereas the lessee, in consideration of certain rights given to "it to pay rentals in United Railways of Havana 15-year 7½ per "cent. Equipment Trust certificates, and within six months after "certain payments of rental to tender additional certificates and "receive cash in exchange therefor, all as hereinafter specifically "set forth, consents to said contemplated assignment."

Then the lease witnesses: "That for and in consideration of "the sum of one dollar ($1) paid by the lessee to the lessor, as "well as of the rentals and covenants hereinafter mentioned, the "lessor has let and leased and by these presents does let and "lease to the lessee, for the term of fifteen years from the fifteenth day of February, 1921, unless sooner terminated as hereinafter provided, the following described railroad equipment "and/or rolling stock, to wit . . ."; and there follows a detailed list of the rolling stock. It is then provided that the rolling stock is leased "at and for the rental hereinafter set out, and upon the "terms, conditions, and covenants following, to wit:

"First. The lessee shall and will pay to the lessor or its "assigns at the office of Commercial Trust Company, hereinafter "called 'the trustee,' in the City of Philadelphia, Pennsylvania, "or at the office of Central Union Trust Company of New York, "in the City of New York when payment in New York is hereinafter specifically required, as rental for the said railroad "equipment and/or rolling stock without deduction for any taxes, "duties, charges or assessments, which the lessee may be required "to pay or withhold under the laws of the United States of "America or of any other country": Pausing there, it is made clear that the primary place of payment is Philadelphia. New York is only used for the payment of interest, as emerges from the provisions of paragraph I (a), which follows, and which, so far as material, reads as follows:

"I. Half-yearly on the fourteenth day of February, and on "the fourteenth day of August in each year, the first payment to "be made on August 14, 1921. (a) A sum payable in New York "equal to 3¾ per cent. of the par value of certain certificates not "exceeding $6,000,000 issued under an agreement bearing even "date herewith between Cuban Rolling Stock Company, and "Commercial Trust Company, trustee, and outstanding and "unpaid on the fourteenth day of February and the fourteenth "day of August, respectively in each year, during the term of "this lease, and an amount equal to the accrued dividends on the "certificates purchased by the trustee during the preceding six "months under the provisions of the said agreement; less such "sums derived from investments by the trustee of undistributed "rentals in its hands, as reported from time to time by it to the "lessee as applicable to the payment of dividend warrants on "the aforesaid certificates."

I shall have to deal with these certificates when I come to consider the next document, which was brought into existence in order to carry out the scheme in accordance with the Philadelphia Plan. Sub-paragraphs (b) and (c) deal with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which are to be paid by the company and would be payable in Philadelphia. By paragraph II provision is made for bi-annual payments on August 14 and February 14 in each year covering the period from August 14, 1921, to February 14, 1936, of sums which are treated as rentals. The payments of interest under paragraph I (a) and the bi-annual payments under paragraph II are calculated to cover the interest and capital and premium payable in respect of the certificates referred to in paragraph I (a). It is then provided that all the bi-annual payments mentioned in paragraph II are to be made in gold coin of the United States of America of the 1921 standard of weight and fineness; and there follows a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of clause first allows the company to pay on any rental day a lump sum sufficient to " enable the trustee to call for retirement and to " retire on the dividend date next ensuing all outstanding United " Railways of Havana 15-year 7½ per cent. Equipment Trust " certificates by the payment of the par value thereof and a " premium of 10 per cent. thereon and accrued dividends thereon " to the date of retirement." This provision serves to emphasize that the payments under the lease are designed to provide the principal and interest reserved by the certificates, the lease, as will later be seen, forming the security for those payments.

Clause second provides that all the rolling stock and replacements, the subject of the lease are " to be plainly marked and " kept marked on both sides thereof with the words: ' Commer-" ' cial Trust Company, Trustee, Phila., Pa., Owner and Lessor, " ' U. H. Equipt. Trust No. . . . '." Clause fourth requires the company " to keep the said railroad equipment and/or rolling " stock insured in some incorporated insurance company or com-" panies of good standing, organized under the laws of the " United States of America or of the United Kingdom of Great " Britain and Ireland, to be approved by the trustee, assignee of " the lessor. . . ." Clause fifth, so far as material, reads as follows: " The lessee further covenants that there shall be no " assignment or transfer of its rights or interest in said railroad " equipment and/or rolling stock under this lease, or any under-" letting of said leased property, without the consent of the " lessor and its assigns endorsed hereon." Clause sixth provides that in case of default in the payment of any of the rentals, the car company may declare the lease terminated and may take possession of the rolling stock. Clause eighth is of importance, and, so far as material, reads as follows: " It is understood and " agreed by and between the lessor and the lessee, that the lessor " may forthwith, upon the execution hereof, assign, transfer, and " set over unto Commercial Trust Company, of Philadelphia, as " trustee, all the lessor's right, title, and interest in and to said " railroad equipment and/or rolling stock hereby leased unto the " lessee, and as well all of the lessor's claims, demands, and " remedies, under this lease accruing or to accrue . . . and that " when it, the lessee, shall have fully paid all the rents, which it " has herein covenanted to pay, the said railroad equipment " and/or rolling stock may be re-assigned by said Commercial " Trust Company, of Philadelphia, trustee, to the lessor, and

" upon such re-assignment and the expiration of the term of this " lease, all said railroad equipment and/or rolling stock shall " revert to the lessor." Clauses eleventh and twelfth are also important and I propose to read them in full.

" Eleventh. It is the intention of the parties to this lease " to enter into and execute this lease in accordance with the " provisions of the laws of the Republic of Cuba to the end that " this lease may be deposited or filed and/or registered there-" under, and the railway company agrees to so deposit and/or " register or file the same, and to record the same in such State " or territories of the United States as may be required by law, " and to perform any other act required by law that may be " necessary to protect the trustee's title. In case it becomes " necessary that this lease be translated into the Spanish " language in order that it may be filed and/or registered in the " proper offices in the Republic of Cuba, then and in that event " it is understood and agreed that the English text shall govern " in case of any conflict between the English and Spanish texts.

" Twelfth. The parties hereto submit themselves to the juris-" diction of the tribunals of the City of Havana, in the Republic " of Cuba, for all notifications, summonses and other judicial or " extra judicial formalities to which this lease shall give rise, with " express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement, to which I will refer as " the agreement," between the car company and Commercial Trust Co., of Philadelphia, a corporation of the Commonwealth of Pennsylvania, to which, and to whose successors as such trustee, I will refer as " the trustee." The agreement recites the lease, and the second recital, so far as material, is: " And " whereas, the car company has purchased the said railroad " equipment and/or rolling stock particularly mentioned in the " lease and has agreed to apply in part payment therefor the " proceeds of six million dollars ($6,000,000) par value of equip-" ment trust certificates, to be issued under the terms of this " agreement, and known as certificates of the United Railways of " Havana 15-year 7½ per cent. Equipment Trust." Then by clause first the car company assigns to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By clause second the trustee covenants " that it will " from time to time execute and deliver to the car company or " upon its order in writing United Railways of Havana 15-year " 7½ per cent. Equipment Trust certificates " [which I will call "the certificates"] "aggregating in par value $6,000,000." Then the clause sets out the intended form of the certificates. It is unnecessary to read the form in full, but it is to be noted that it is framed to fit in with the payment provisions of the lease. For instance, the due date of payment is February 15, 1936, the day after the day fixed for payment of the last rental under the lease. Payment is to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease, "but only from and out of the rentals when "paid as provided for in the lease . . . which rentals are payable "to the trustee for the benefit of" the certificate holders. Clause fourth deals with the issue of the certificates. It is not, I think, necessary to consider the terms of this clause. The money which the company required and which the certificates secured, to use the word in a loose sense, was provided pursuant to an underwriting agreement consisting of a letter dated February 9, 1921, written by Dillon Read & Co. of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause seventh is of importance. It opens thus: "In the event of default by the railway company, as afore- "said, if it be thought necessary or convenient for the purpose "of enforcing and carrying out all the terms and stipulations of "the lease and this agreement under the laws and statutes of the "Republic of Cuba"—then provision is made for the assignment of the lease and all rights thereunder, "to any person or other "corporation as substituted trustee authorized to act or doing "business in the Republic of Cuba." Clauses eleventh and twelfth are similar in terms to clauses eleventh and twelfth in the lease, except that this last paragraph of clause twelfth appears in the lease as the last paragraph of clause eleventh. By an agreement dated April 27, 1922, the car company resold the rolling stock to the company, "subject to and with the "benefit of the lease and the agreement."

The position, therefore, at this point (without prejudice to any question of Cuban law) was that the company had received the net proceeds of the sale of the certificates to the public. It had the right, subject to performing its obligations under the lease, to have the property in the rolling stock revested in it. In the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. Finally, as a result of the resale by the car company to the company, the car company dropped out of the picture and was later dissolved.

Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,869,000. It defaulted in paying the instalment of $206,000 due on February 14, 1931, and all subsequent instalments. It has thus defaulted in respect of the last eleven instalments of capital, a total of $2,256,000. In this connexion it is important to bear in mind that the certificates themselves impose no liability on the company. The company's liability, assuming that it still exists, arises solely under the lease. Its liability is to pay to the trustee the proper sum in United States of America dollars necessary to discharge its obligations under that document. The certificates, in effect, do no more than evidence the amount which the holders thereof are entitled inter se to receive from the trustee, in so far as the trustee receives payment from the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including August 14, 1934. The trustee took no step under clause sixth of the lease to declare the lease terminated. Apart, therefore, from any impact on the continued existence of the lease which Cuban law may have, assuming that it applies in this case, the lease must be treated as continuing, the company being in default thereunder. The trustee took no step under the same clause to take possession of the rolling stock; but this circumstance I regard as colourless. Further, I take the view that it would not have been possible for the trustee to have obtained possession of the rolling stock for reasons which will appear when I come to consider the effect of the relevant provision of Cuban law, namely, Military Order No. 34 of 1902.

In 1934, 1940 and 1941 legislation was brought into force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930s. The benefit of the moratorium laws extended to public service railroad companies. I shall have to consider the provisions of these laws in some detail, but I propose to defer any reference to their contents until I come to consider the questions of Cuban law which have been debated. On June 6, 1949, an interventor was appointed by the Cuban Government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets

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should be sold to the Cuban Government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock and shares was prepared, brought before the court, and sanctioned by Vaisey J. on December 15, 1952. Neither the holders of the certificates nor the trustee on their behalf were parties to the scheme, but the certificates are mentioned in Part IV, paragraph 13, of the Preliminary to the Scheme, where there is a statement that the certificates are not affected by the scheme. Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence, to which I must now refer. The first is Law-Decree No. 980, dated July 24, 1953. Article 1 opens thus: "This Law-Decree is entitled 'Law-Decree on the acquisition, "'operation and rehabilitation of the United Railways of "'Havana and subsidiary companies.'" Article 3 authorizes the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, article 6, deals with the incorporation of this company, to which I shall hereafter refer as "Occidentales." Article 8 provides that the State will convey the properties acquired from the company to Occidentales, "and the latter shall "assume the liabilities, which the State shall have contracted "by the acquisition of the properties." Article 13 provides that Occidentales "cannot sell the real estate they acquire as con-"veyed by the State except" as specifically provided in that article. Article 14 opens with the words "The State on making "the conveyance . . ." I mention these provisions because, as I construe this Law-Decree according to the principles of construction of English law (and it is agreed that there is no or no material difference between the principles of construction of English law and those of Cuban law), what is envisaged is, first, a sale by the company to the Cuban State, and then a resale by the State to Occidentales. The matter becomes material when one comes to consider the Cuban law in this regard, because the two experts on Cuban law differed as to the effect of the transaction as carried out by this Law-Decree and the three documents to which I am about to refer. Dr. Gorrin, for the applicants, regarded the transaction as a sale to the State and then a resale by the State to Occidentales. On the other hand, Dr. de Cubas, for the liquidator, expressed the view that a Cuban court would treat the matter as being one in which only one sale was involved.

The next document to which I must refer is called "Preliminary Agreement." It is dated September 5, 1953. It concerns the company and a wholly-owned subsidiary of the company, to which I will refer as "Terminal," as vendors and the Cuban State as purchasers, and provides, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000, "which amount will "be received . . . at the moment of signing the public deeds, "by virtue of which there shall be transferred to the State in "full and absolute dominion the assets and properties described "in Annex A." Clause Fourth (B) is important, and I read it: "The price agreed upon shall be received by 'The Uniteds' and "'The Terminal' free from all responsibility with respect to "liabilities outstanding in Cuba, represented by debts, obligations "and responsibilities arising out of the operations of the pro-"perties which are to be acquired by the State, whether involving "operations prior to June 10, 1949, on which date said properties "passed to the management of the Interventors of the Govern-"ment of Cuba, or subsequent to that date." Included in annex A as assets is this item: "$1,867,000 of nominal value, "amount of the company's holding of the 7½ per cent. Equip-"ment Certificates." On the same day, namely, September 5, 1953, as the preliminary agreement was executed, another agreement—to which I will refer as "the confidential agreement"—was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It is of importance, and I propose to read parts of it. It states that the parties have agreed: "First: That among the liabilities in respect of which "the State liberates 'The Uniteds' from all responsibility, in "accordance with letter B of clause fourth of the preliminary "agreement signed on this same date between the same parties, "it is understood to be included the responsibilities that may "derive from the 7½ per cent. Equipment Trust Certificates "which were issued under agreement dated February 15, 1921, "between the Cuban Rolling Stock Company and Commercial "Trust Company, as trustees."

"Second: That what is established by this agreement does "not signify that the State or 'The Uniteds' acknowledge or "admit that there can exist legal merit in any claim, demand "or proceedings that may be established as a result of the "referred to 7½ per cent. Equipment Trust Certificates, but that "it is exclusively established what is mentioned in this agreement in respect thereof for the supposed case that a sentence may be handed down as a result of any claim, demand or proceedings derived from said 7½ per cent. Equipment Trust Certificates, whether it be before courts of justice of the republic or in foreign courts."

And, finally, in clause fifth, it is provided: "That the contents of the present confidential agreement cannot be revealed by any of the signing parties, but it will be understood that it binds them just as if it had been stipulated in the preliminary agreement referred to in paragraph first."

I shall have to consider the effect of the confidential agreement and its impact on clause fourth (B) of the preliminary agreement when I come to deal with the questions of Cuban law which have been debated.

I pass now to Law-Decree 1197, dated November 26, 1953. The second recital is of importance. It states: "Whereas: In accordance with the provisions of Military Order No. 34 of 1902, it was agreed in section (B) of clause fourth of the preliminary agreement executed between the Government and the" company and two other companies "that the said companies as vendors would receive the agreed price free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties to be acquired by the State, and it is therefore appropriate to declare that the provisions of section (u), article 1, of Chapter V of the aforesaid Military Order are inapplicable to the liquidation of the three selling companies, since upon the passing of such liabilities to the Cuban Government the latter shall adopt such measures as it may deem appropriate for the liquidation thereof." Article second provides that: "Section (u), article 1, chapter V, of Military Order No. 34 of 1902 is declared inapplicable to the liquidation and dissolution of the" company and two other companies.

I come now to the deed of purchase, which is dated December 1, 1953. By this deed the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being "in a real and effective manner absolutely free from encumbrances." The seventeenth clause provides: "That in consequence of the sale hereby accomplished, they transfer in favour of the Cuban State the full and absolute dominion and possession, with such further rights and equities, real and "personal, without any exception, as the vendors have or hold "in the properties before mentioned, the Cuban State receiving "them as its own, acquired by a just and legitimate title, as is "the present deed, which at all times shall be considered as "symbol of real delivery and possession and leaving the Cuban "State subrogated in the same place and stead of the vendors." The twentieth clause reads as follows: "That in the purchase-"sale are included all the assets and any other properties situated "in the Republic of Cuba, without exception whatsoever, which "comprise and constitute the railroad system which the vendors "have been operating." On the same date as the deed of sale was executed, namely, December 1, 1953, a document, which is not in evidence and the precise terms of which are not known, was executed, the parties being the Cuban State and Occidentales, by which the Cuban State sold to Occidentales the undertakings which it had acquired from the Cuban State. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing that certain property was retained by the State. The details do not matter: the important circumstance is that not all the property acquired by the State was resold by it, a matter which obviously has a bearing on the question whether under Cuban law there was a sale to the State and then, as a separate step, a resale by the State, or only one sale from the company to Occidentales. The purchase price was duly paid by the Cuban State in United States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provision of the scheme of arrangement. On March 4, 1954, the company went into voluntary liquidation.

On June 18, 1954, the applicant, who is the present trustee for the certificate holders, lodged a proof. The basis of the claim appears in paragraph 4 of the proof, which reads as follows: "The claimant is the present trustee for the holders of the said "certificates, being the successor in office of Commercial Trust "Company of Philadelphia the original trustee thereof. The "liability of the company to the claimant which is the subject-"matter of this proof arises under or by virtue of a covenant by "the company with Cuban Rolling Stock Company contained in "an agreement dated February 15, 1921, but executed on "April 18, 1921, between the said Cuban Rolling Stock Company "of the one part and the company of the other part the benefit "whereof including the ownership of the said railway equipment "was by a trust agreement dated February 15, 1921, but executed "on April 18, 1921, assigned by the said Cuban Rolling Stock "Company to the said original trustee of whom the claimant is "the successor in title." Paragraph 2 of the proof seeks to quantify the claim of the applicant as trustee in respect of the last eleven instalments payable under clause First II of the lease and the premium of 2½ per cent. on their face value and interest. Paragraph 2 (b) quantifies a claim for reasonable expenses under clause First I (b) of the lease. Paragraph 2 (c) deals with a claim for expenses incurred or to be incurred by the applicant as trustee since March 4, 1954. Paragraph 2 (d) quantifies a claim in respect of the certificates of the face value of $1,867,000, which had been purchased by the company. I am not concerned with this claim, because any claim in respect of these certificates was renounced, and on that basis Roxburgh J., by an order of December 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of these certificates. The main claim is a claim in contract under the lease. Two alternative claims in paragraph 4 were abandoned at this hearing, but the applicant pursues, as alternative to his main claim and as alternative to each other, two further claims, the first for damages for breach of the covenant in the lease not to assign the rolling stock without the consent of the trustee, and the second for damages for conversion of the rolling stock by the company. In connexion with the last two items, it is relevant to mention that in a letter dated July 2, 1953, from the secretary of the company to the trustee, it was stated that for financial reasons the insurances effected by the company were being reduced in amount, and, in pursuance of that policy, the insurance of the rolling stock had been reduced to a value of $2,000,000, "being the estimate of the present day value of this "rolling stock calculated by reference to an inventory made in "June, 1948, subject to depreciation since then." On November 19 the liquidators rejected the proof. From this rejection the applicant has appealed to this court, and on the hearing of the summons a number of difficult and complicated questions of law have emerged with which I must now proceed to deal.

The first question to which I propose to address myself is whether the obligation of the company under the lease is still subsisting or whether it has been discharged. The answer to this question depends in the first instance on ascertaining which law is the correct law to apply. Only two systems of law were really canvassed, the law of Pennsylvania and the law of Cuba. If it is correct to apply the law of Pennsylvania, it is because the correct law to apply is the proper law of the contract, and the proper law of the contract is the law of Pennsylvania. If it is correct to apply the law of Cuba, it is either because the correct law to apply is the proper law of the contract and the proper law of the contract is Cuban law, or because the effect of a debt emerging from the contract and achieving a separate existence is that the correct law to apply is the lex situs and the debt is situate in Cuba. If the law of Pennsylvania applies, then there is no ground for saying that the company's obligations under the lease have been discharged. If the law of Cuba applies, then one is faced with a volume of very conflicting evidence from the two distinguished Cuban lawyers who have given evidence.

I propose to deal first with the question whether the correct law to apply is the proper law of the contract or the lex situs. Mr. Megaw's proposition is to this effect: the proper law of a contract is not relevant on the question whether or not a debt arising out of the contract and due and payable has been extinguished, except in so far as the ascertainment of the proper law may throw some light on the situs of the debt. The fact that a debt arises out of a contract is purely history. Once it is due and payable it is a chose in action with a separate existence; and the circumstance that there may be other terms of the contract which are executory is irrelevant. The proposition then is as simple as this: if the debt can be sued for, then the lex situs must be applied in order to see whether it has been discharged or not: if, however, the debt is still a future debt, in the sense that it is not presently payable, then it is the proper law of the contract which is to be applied.

The first case on which Mr. Megaw relied was *Ellis* v. *M'Henry.*[1] In that case, which was a bankruptcy case, Bovill C.J. said[2]: "In the first place, there is no doubt that a debt or "liability arising in any country may be discharged by the laws "of that country, and that such a discharge, if it extinguishes "the debt or liability, and does not merely interfere with the "remedies or course of procedure to enforce it, will be an effec-"tual answer to the claim, not only in the courts of that country, "but in every other country. This is the law of England, and "is a principle of private international law adopted in other "countries." He then cites a number of authorities to which I need not refer. He then goes on[3]: "Secondly, as a general

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[1] (1871) L.R. 6 C.P. 228.

[2] Ibid. 234.

[3] Ibid.

"proposition, it is also true that the discharge of a debt or "liability by the law of a country other than that in which "the debt arises, does not relieve the debtor in any other "country"—for which proposition again he cites authority. In my view this case does not support the proposition contended for. As is pointed out in Dicey, Conflict of Laws, 6th ed., p. 653, the reference to the country in which a debt or liability arises is, in modern parlance, a reference to the proper law of the contract. In Cheshire on Private International Law, 5th ed., p. 499, this case is treated as one which was concerned with the proper law of the contract, and certainly not as one in which the lex situs was involved: and this is the view which for myself I take of this case. The next case cited by Mr. Megaw was *Swiss Bank Corporation* v. *Boehmische Industrial Bank.*[4] The headnote reads as follows: "Judgment having been recovered against "a foreign corporation, who submitted to the jurisdiction, a "garnishee summons was issued to attach a debt due from a "London bank to the foreign corporation:—*Held*, that the judgment creditors were entitled to have an order nisi made "absolute, inasmuch as payment under a garnishee order "operates as a discharge of the amount paid and is recognized "by international law as having that effect, and consequently "there was no real risk of the garnishees being obliged to pay "the debt over again to the foreign corporation, and there was "therefore nothing inequitable in making the order absolute." What I am concerned with here is whether or not a contractual obligation has been discharged or not, and I do not consider that cases relating to title are of much assistance. Further, it should be observed that in this case the debt owing by the bank was not only situate in England but was governed by English law. Cheshire, 5th ed., p. 246, treats this case as one governed by the proper law of the contract. The next case on which Mr. Megaw relied was *In re Claim by Helbert Wagg & Co. Ltd.*[5] In the course of his judgment Upjohn J. said[6]: "The first "question that I must determine is whether the applicability "of the moratorium law is to be tested by reference to the "local situation of the debt or by the proper law of the contract. "I am concerned with the effect of a law passed in 1933 upon a "series of debts which, although accrued, only became payable "on or after September 3, 1939. In my judgment, the question

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[4] [1923] 1 K.B. 673; 39 T.L.R. 179.

[5] [1956] 1 Ch. 323; [1956] 1 All E.R. 129.

[6] [1956] 1 Ch. 323, 339.

" whether a liability to pay a debt payable on a future date has " become modified or annulled by legislation must depend upon " the question whether such legislation affects the contractual " obligation, for the matter still rests in contract. Indeed, it does " not seem appropriate to speak of a debt having a local situation " until it is payable and can be recovered by suit, for its situs " primarily depends upon the residence of the debtor when it is " recoverable. I think that distinction was recognized by " Pearson J. in *F. & K. Jabbour* v. *Custodian of Israeli Absentee* " *Property*,[7] where he was concerned with debts or choses in " action such as a claim for unliquidated damages which could be " sued for at the date of the modifying legislation. The power of " legislation to affect a contract by modifying or annulling some " term thereof is a question of discharge of the contract which, " in general, is governed by the proper law." Mr. Megaw seeks to use that passage in this way. He says first that it shows that the reason for looking at the proper law is that if the liability is a liability to pay on a date after the relevant legislation, then it is correct to apply the proper law of the contract. On that basis, he says, it follows by necessary inference that if the debt can be sued for before the date of the legislation, then the debt has a situs and it is the lex situs which should be applied. I am unable to follow Mr. Megaw in drawing the inference which he seeks to draw. I regard that passage from the judgment of Upjohn J. as recognizing that the questions regarding the discharge of a contract are in general governed by the proper law of that contract, and that cases where the obligation is a debt payable in the future are a fortiori cases which must be governed by the proper law.

In *In re Russian Bank for Foreign Trade*,[8] on which Mr. Megaw relied, no question was raised which involved a choice between the proper law of the contract and the lex situs. Apart from the question of jurisdiction to make an order winding up the bank, which Maugham J. held that he had, the dispute between the parties was as to whether or not the debt, on which the petition was founded, existed or not. If it was situated in Russia, Maugham J.'s view was that it must be taken to have been destroyed by the Russian legislation. If, on the other hand, it was situate in England, the Russian legislation, being of a confiscatory nature, could not operate to extinguish the debt. Maugham J. took the view that he had insufficient evidence to resolve that dispute, but ordered the company to be wound up, notwithstanding that the debt was disputed. On that analysis, and assuming it to be correct, I do not see how that case supports the proposition contended for.

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[7] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

[8] [1933] Ch. 745; 49 T.L.R. 253.

Taking the cases in the order in which Mr. Megaw cited them, the next case to be considered is *In re Banque des Marchands de Moscou* (*Koupetschesky*).[9] Here, again, no conflict was raised between the proper law and the lex situs. In the course of his judgment Vaisey J. said[10]: "It is not and cannot "be, I think, disputed that according to our law the debt is "situate where the debtor is, and I do not think that it can really "be disputed that these claims have to be regulated by Russian "law; English law does not come into this matter at all."

Later he said[11]: "Mr. Gwyn Rees, who appeared for the "Royal Exchange Assurance, frankly admitted that if the case "was governed by the principle laid down by Maugham J. in "*In re Russian Bank for Foreign Trade*,[12] the claim of his "client must necessarily fail. I think that it does fail, and I "think that it fails on that comparatively short and simple "ground. It seems to me that the claim of the Royal Exchange "Assurance is governed by Russian law. I think that that was "the proper law of the contract between those claimants and "the bank."

It was suggested by Mr. Megaw that Vaisey J.'s reference to the proper law of the contract was per incuriam: but I find it difficult to accept this view because of the sentence which follows[13]: "I think that that claim can be, and could have "been, discharged according to the provisions and, I think, only "according to the provisions of Russian law; and that the "rights and remedies of the claimants were all put an end to "by one or other of the decrees applicable in this case."

As I read it, Vaisey J. was saying that under the proper law of the contract, which would be the correct law to apply when considering whether an effective discharge of the obligation had been effected, the obligation had been discharged. For myself I should have thought that on the facts disclosed in the report the proper law of the contract was Russian law. If that be so there was a coincidence of proper law and lex situs. Apart from this consideration, the case can be regarded as covered by

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[9] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[10] [1952] 1 T.L.R. 740–741.

[11] Ibid. 744.

[12] [1933] Ch. 745.

[13] [1952] 1 T.L.R. 739, 744.

Maugham J.'s decision in *In re Russian Bank for Foreign Trade.*[14]

The next authority cited was *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property.*[15] In that case Pearson J., having held that an indemnity claim under an insurance policy was a chose in action, proceeded to consider the situation of the particular chose in action. It is, I think, important to bear in mind that this case involved simply a consideration of the title to the chose in action. It did not involve the question what is the correct law to apply to the discharge of a contract. Pearson J. had to consider the effect, in connexion with the question of title, of the Emergency Regulations concerning Properties of Absentees made by the Israeli Finance Minister in 1948 and the Absentee Property Law, 1950. As regards the effect of the regulations his finding was as follows[16]: "Having regard to the ordinary "scope of the word 'movables' and to the inherent improba-"bility that debts and choses in action would be left unaffected "by such regulations, and to the language of regulation 7 and "regulation 22 (a) (2), I hold, after taking into account Mr. "Megaw's argument, that the chose in action—the claim against "the insurance company—was a 'movable' and therefore "'property' for the purposes of the regulations." Pearson J. referred to further provisions in the regulations and continued: "I hold that under these regulations the chose in action—the "claim against the insurance company—became vested in the "custodian." He then proceeded to consider whether the position had been altered by the Absentee Property Law, 1950. His conclusion on that question is thus expressed[17]: "It follows, "in my opinion, that the provision for continued vesting, con-"tained in regulation 5 (d) of the regulations and carried on with "only minor alterations by section 4 (*c*) of the law, has the effect "of keeping the chose in action continuously vested in the "custodian notwithstanding the replacement of the regulations "by the law. That is a proper extraterritorial operation of the "law. Personal property, which has become vested in a state "department, or official of some country by legislation of that "country, while the property was situated in that country, does "not cease to be so vested by reason of its subsequent removal "to another country: *Princess Paley Olga* v. *Weisz.*[18] I should "add that in the present case it is not proved that the chose in

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[14] [1933] Ch. 745.

[15] [1954] 1 W.L.R. 139.

[16] Ibid. 150.

[17] Ibid. 152.

[18] [1929] 1 K.B. 718; 45 T.L.R. 365.

"action had ceased to be situated in Israel by March 31, 1950, "or at any time. I therefore hold that the defendant succeeds "in this issue, because the chose in action became vested in the "defendant under the regulations of 1948 and remained vested "in the defendant under the law of 1950." So that the ground of his decision is that the title to the chose in action was in the custodian because it had become vested in him by virtue of the legislation. That would have been sufficient to dispose of the case, but Pearson J. thought it right to advert to an argument which had been addressed to him, and he proceeded as follows [19]: "It is right, however, to say something about a contention of "Mr. Caplan, to which much argument was directed on both "sides, because if Mr. Caplan's contention is correct the case "should be decided in his favour on a different ground. He "contended that the law by which a debt or chose in action can "properly be affected (whether by discharge or modification or "transfer of the right) is the proper law of the contract, rather "than the lex situs. Mr. Megaw contended, inter alia, that the "only law by which a debt or chose in action can properly be so "affected is the lex situs. The problem arises because a debt "or chose in action can be regarded in two ways: (1) it can be "regarded as properly movable property, and when so regarded "it naturally falls under the lex situs; (2) it can be regarded as "a still unperformed obligation under a contract, and therefore "it might be still subject to the proper law of the contract and "liable to be discharged or altered by that law. A legislative "provision that a debt or a chose in action owing to A shall "be discharged by payment to B could be regarded either as "involving a transfer of the ownership of the property from A "to B, or as an alteration of the contractual obligation by "substituting B for A as the obligee." He then expresses the view that Mr. Caplan's contention could be shortly disposed of. He says [20]: "I am inclined to think that there is a short answer "to Mr. Caplan's contention in this case. The Israeli law of "1950 is, on the face of it, a law dealing with property and not "with contract, and therefore it should be construed as applying "only within those territorial limits which are appropriate to "property legislation. Accordingly, an initial vesting under that "law could only be of a property situated in Israel, and if Mr. "Caplan had to show that this chose in action was caught de "novo by the law of 1950, he would fail to do so for want of

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[19] [1954] 1 W.L.R. 139, 152.

[20] Ibid. 152.

"proof that the chose in action was situated in Israel at or after "the time when the law came into force."

He then deals in some detail with the authorities cited in support of the respective arguments, and makes this comment[21] on *Perry* v. *Equitable Life Assurance Society of the United States of America*[22]: "That is a clear decision that a contract can be "annulled, the contractual nexus between the parties can be "dissolved, by legislation of the country whose law is the proper "law of the contract. It is to be observed, however, that as no "payment would have become due under the policy before the "year 1923, and the contract was annulled in 1919, if not earlier, "no chose in action had arisen, so there was nothing to which "any lex situs could apply."

The last two passages from the judgment of Pearson J. to which I desire to refer are these[23]: "On the other side there are "a number of authorities which tend to show that only the lex "situs can alter the title to debts and choses in action. "Evidently, there is a considerable weight of authority in "favour of the view that only the lex situs can alter the title "to debts and choses in action, and the authorities cited to prove "the contrary proposition do not seem to have that effect. On "principle, there is the consideration that, if the action to "recover a debt or chose in action is brought in the country where "it is properly recoverable and therefore situated, and if there "is a conflict between the lex situs and the proper law (the one "having legislation which vests the debt or chose in action in A "and the other having legislation which vests the debt or chose "in action in B), the court trying the action will be bound to "apply its own law which is the lex situs." These expressions of opinion certainly do not go the length of saying that on a question whether a contract has been discharged, the lex situs ousts the proper law of the contract. The only opinion expressed is that it is probably the lex situs which must be applied when the question to be resolved is whether or not the title to debts or choses in action has been altered. I, therefore, take the view that this case still leaves open the question which I have to decide.

Those are the authorities on which Mr. Megaw relied for his main proposition. I turn now to the authorities which Mr. Wilberforce cited on this point. The first was *Antony Gibbs &*

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[21] [1954] 1 W.L.R. 139, 154.

[22] (1929) 45 T.L.R. 468.

[23] [1954] 1 W.L.R. 139, 156.

Sons v. *La Société Industrielle et Commerciale des Métaux,*[24] which case, it is to be observed, was not cited to Pearson J. or mentioned in his judgment. The headnote reads as follows: "A party to a contract made and to be performed in England is "not discharged from liability under such contract by a discharge "in bankruptcy or liquidation under the law of a foreign country "in which he is domiciled." The relevant facts appear from the opening sentences of the judgment of Lord Esher M.R.[25]: "In this case the defendants, a French company, entered into "negotiations for the purchase of copper through a London "metal broker, who effected contracts between them and the "plaintiffs in England in the ordinary way. He drew up bought "and sold notes, by which the contract was expressed to "be according to the rules of the London Metal Exchange. "One of these notes he sent to the plaintiffs, and the other he "sent to the defendants; and both parties retained the notes so "sent to them. The contracts were for the purchase of copper "to be delivered in England. It appears to me impossible to "deny that these were English contracts. The contracts being "so made, the defendants became bound to accept the copper "contracted to be sold. The plaintiffs were always ready and "willing to deliver the copper; but the defendants were not ready "to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled "to sue the defendants for non-acceptance of the copper, the "measure of damages being the difference between the contract "and market price at the time of the breaches of contract. But "the defendants are a French company domiciled in and "governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced "to be in judicial liquidation. It was asserted by the defendants "by way of defence to the action that the pronouncing of that "judgment by the French tribunal by the law of France operated "as a discharge of the defendants from liability to an action on "the contracts; and it was asserted that it so discharged them "in more than one way. It was said that such a judgment "dissolved the French company, so that it no longer existed, and "so dissolved their liability to be sued on the contracts. It was "further said, that the fact of the plaintiffs having by their "agents offered proof of their claims before the French tribunal

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[24] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[25] 25 Q.B.D. 399, 403.

"operated as a discharge of the defendants' liability to this "action."

Later he said[26]: "The question really is, whether anything "has been proved which is an answer to the plaintiffs' action in "this country according to the law of England. It is clear that "these were English contracts according to two rules of law; "first, because they were made in England; secondly, because "they were to be performed in England. The general rule as to "the law which governs a contract is that the law of the country, "either where the contract is made, or where it is to be so "performed that it must be considered to be a contract of that "country, is the law which governs such contract; not merely "with regard to its construction, but also with regard to all the "conditions applicable to it as a contract. I say 'applicable to "'it as a contract' to exclude mere matters of procedure, which "do not affect the contract as such, but relate merely to the "procedure of the court in which litigation may take place "upon the contract. The parties are taken to have agreed that "the law of such country shall be the law which is applicable "to the contract. Therefore, if there be a bankruptcy law, or "any other law of such country, by which a person who would "otherwise be liable under the contract would be discharged, and "the facts be such as to bring that law into operation, such law "would be a law affecting the contract, and would be applicable "to it in the country where the action is brought.

"That, at any rate, is the law of England on the subject. "So, where a contract is made or is to be performed in a foreign "country, so as to be a contract of that country, and there is a "bankruptcy law, or the equivalent of a bankruptcy law, of that "country, by which, under the circumstances that have occurred, "a party to the contract is discharged from liability, he will be "discharged from liability in this country. But it is only in "virtue of the principle which I have mentioned that such a "discharge from a contract takes place. It is now, however, "suggested that, where by the law of the country in which the "defendants are domiciled the defendants would, under the "circumstances which have arisen, be discharged from liability "under a contract, although the contract was not made nor to be "performed in such country, it ought to be held that they are "discharged in this country. It seems to me obvious that such a "proposition is not in accordance with the principle which I

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[26] 25 Q.B.D. 399, 405, 406.

"have stated. The law invoked is not a law of the country to "which the contract belongs, or one by which the contracting "parties can be taken to have agreed to be bound; it is the law "of another country by which they have not agreed to be bound. "As Lord Kenyon said, in *Smith* v. *Buchanan*,[27] it is sought to "bind the plaintiffs by a law with which they have nothing to do, "and to which they have not given any assent either express "or implied. The proposition contended for seems to me to "contravene the general principle to which I have alluded as "governing these matters, and to suggest a principle for which "there is no foundation in law or reason. Why should the "plaintiffs be bound by the law of a country to which they do not "belong, and by which they have not contracted to be bound? "Therefore, if it were true that in any of the modes suggested the "defendants were by the law of France discharged from liability, "I should say that such law did not bind the plaintiffs, and that "they were nevertheless entitled, according to English law, to "maintain their action upon an English contract."

That case is a strong case and it has, so far as I know, never been questioned. It is quite true that at the time when that case was decided in 1890, the phrase "proper law of the contract" had not emerged, but there can be no doubt that Lord Esher M.R. was stating as well established that the discharge of a contract is to be governed by its proper law. The case is cited, and, in my view, justifiably cited, by Dr. Cheshire for this proposition: "There is no doubt, either on principle or authority, that dis- "charge affects the substance of the obligation and that it is "governed by the proper law of the contract": see Cheshire, Private International Law, 5th ed., p. 246. It is cited by Dicey, Conflict of Laws, 6th ed., p. 651, in support of rule 143: "The "validity of the discharge of a contract (otherwise than by bank- "ruptcy) depends upon the proper law of the contract."

The other case on which Mr. Wilberforce relied was *Metliss* v. *National Bank of Greece and Athens S.A.*[28] The essential facts emerge from a single sentence at the beginning of the judgment of Romer L.J.: "In this case the plaintiff is suing the defendant "company on a guarantee to which the company was not a party. "The guarantors were the National Bank of Greece, but the plain- "tiff's case is that by reason of a decree passed in Greece (which "was the country of the National Bank's domicile) the bank

[27] (1800) 1 East 6.

[28] [1957] 2 Q.B. 33, 47; [1957] 2 All E.R. 1.

" ceased to exist in 1953 and the whole of its assets and liabilities, " including the liability to the plaintiff under the guarantee, " became vested in the defendant company." Denning L.J. said at the opening of his judgment, as reported [29]: " Notwith-" standing that moratorium, if an English bondholder had " brought an action in the English courts for the interest due to " him, either against the principal debtor, the National Mortgage " Bank of Greece, or against the guarantors, the National Bank " of Greece, or against both, the English courts would without " doubt have given judgment for the interest due. The English " courts would not have recognized the moratorium. The proper " law of the contract was English law and no enactment of the " Government of Greece could affect the matter "—for which proposition he cites authority. At the end of his judgment he says this [30]: " This brings me to the second point. The defen-" dant company says that if the English courts recognize Greek " law so as to make it liable as universal successor, so also they " should recognize the Greek law of moratorium. The English " courts cannot, it is said, when dealing with the liability of the " defendant company, take the Greek law in part and reject it " in part. They must recognize it in whole or ignore it altogether. " This is a forceful argument, but I do not think we can give " effect to it. The rules of private international law do not " permit it. The debtor is a Greek debtor but the debt is an " English debt. When we are considering the personality of the " debtor or succession to his personal effects, we must apply " Greek law because he is a Greek; but when we are considering " the amount of the debt and the obligation to pay it, we must " apply English law because it is an English debt. If the old " National Bank of Greece had continued in existence, the " English courts would give judgment against that company for " immediate payment without regard to the moratorium. Greek " law has destroyed the old National Bank of Greece and has set " up the new company in its place. We recognize that Greek " law has power of life and death over the company which it " created, and we must accept the substitute which it has pro-" vided. But when the substitute stands in our courts to answer " for an English debt, it must answer according to English law, " which says that the debt must be paid according to its terms." It is clear from those two passages that he is treating the debt as English because the proper law of the contract was English.

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[29] [1957] 2 Q.B. 33, 40.

[30] Ibid. 46.

This was also the view of Romer L.J., who said[31]: "The plaintiff "does not, and could not, rely on novation, but he rests his claim "solely on the decree coupled with the fact (now admitted by "the defendant company) that the proper law of the contract "of guarantee was English. The defendant company's answer, "in short, is that our courts will not recognize or enforce against "it a liability which it did not contractually accept but which "was imposed upon it by foreign law, videlicet, by the law of "Greece." And finally Parker L.J., in his judgment, said[32]: "The application of the foreign law to status does not involve "applying the foreign law as to obligations. What was transferred was the liability under the guarantee, whatever it might "from time to time be. If the old National Bank of Greece was "liable to be sued in England, as it was, so could the new bank." It appears to me, therefore, that this case supports the view that it is to the proper law to which one must turn to find out whether a contract has been discharged or not.

In this state of the authorities, I come to the conclusion that the proposition contended for by Mr. Megaw is not established as a rule of English private international law. To my mind it would offend against both principle and considerations of convenience. It must be remembered that, as Dr. Cheshire says (Private International Law, 5th ed., p. 246): "discharge affects "the substance of the obligation," whereas questions of title to and assignment of the benefit or burden of the obligation do not. Every contract has a proper law: it is the law which the parties either expressly or impliedly have chosen to govern their contractual relations. One of the most important aspects of any contract is the manner in which it is to be discharged, and one would suppose that the parties would intend the law which they have chosen as the proper law to govern that important matter—discharge. But according to the proposition advanced, the maturing of the obligation of the debtor under the contract into a debt of itself takes that debt out of the contract, and therefore extinguishes the pre-existing obligation, and forces the creditor, whether he wishes to do so or not, to have recourse to the law of the debtor's residence in order to enforce the debt.

I cannot regard this as sound in principle. It is not supported by the authorities. Indeed, to my view it is contrary to the reasoning of Lord Esher M.R. in *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux.*[33] I, therefore, hold that it is the proper law of this contract which must be applied in the present case to determine whether the lease has been discharged or not.

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[31] [1957] 2 Q.B. 33, 47.

[32] Ibid. 54.

[33] 25 Q.B.D. 399.

The next question, therefore, is what is the proper law of the lease. The lease is expressly recited in the agreement, and in the lease there is a recital of the intention immediately to assign the benefit of the lease to the trustee. The two documents are essential parts of the same transaction, namely, the Philadelphia Plan. In those circumstances one would expect that they each would have the same proper law, and I hold that they have.

Now, but for clauses eleventh and twelfth in each document I should not hesitate to hold that the proper law in each document is the law of the Commonwealth of Pennsylvania. The object of the transaction was to raise money in the United States of America by an essentially American method connected particularly with Pennsylvania. Pursuant to the Philadelphia Plan, the trustee was a Philadelphian corporation having its place of business in Philadelphia. The money to be raised was to be in American dollars primarily from the American public. Payment of capital under the certificates and of rentals under the lease were to be made in gold coin of the United States of America in Philadelphia. The lease was brought into being in order to give the trustee on behalf of the holders of certificates something in the nature of a security, and the fact that the rolling stock was to be used in Cuba would not alter my view that the proper law of the contract was the law of Pennsylvania. There is a further point: it is very difficult to imagine why the parties to the agreement should choose the law of Cuba as the proper law of the agreement. Clause seventh of the agreement appears to me strongly to militate against the conclusion that they have done so. It presupposes that a choice is open to the trustee as to whether it will sue in Cuba or not, but if clauses eleventh and twelfth have the effect that the parties have submitted to the jurisdiction of the Cuban courts and the law of Cuba for all purposes, then the trustee has no such choice. Clause eleventh of the lease expresses the intention of the parties to enter into and execute the lease in accordance with the laws of Cuba, " to the end that " the lease may be registered in Cuba. Mr. Megaw submitted that the words " to the end that " merely introduced a consequence, but did not cut down the generality of the preceding words. I do not share that view. In my opinion, those words state the purpose for which the lease is to be executed in accordance with the laws of Cuba, and they are exhaustive of the purpose. That purpose is the same as the purpose of the latter part of the clause, namely, to protect the trustee's title. In my judgment, on its true construction clause eleventh is narrow in its scope and does not have the effect of making the law of Cuba the proper law of the lease or the agreement. The effect of clause twelfth depends primarily on its construction, and reference to authorities is not helpful unless upon examination the meaning and scope of the clause appears doubtful. It is to be observed that the submission is not general: it is not for all purposes, but for purposes which are expressed in the clause, namely, " for all notifications, sum-" monses and other judicial or extra-judicial formalities to which " this lease shall give rise." The presence of the word " other " has the effect that the word " formalities " qualifies everything from " notifications " onwards. The clause, therefore, is dealing with matters of form and is complementary to clause eleventh. The last phrase " with express renunciation of their own juris-" diction " is, as must follow from the use of the word " with," a renunciation for the purposes only of the limited submission. I would apply the same reasoning and the same construction to clauses eleventh and twelfth of the agreement.

In the result I conclude that the proper law of both the lease and the agreement is the law of the Commonwealth of Pennsylvania. It follows, therefore, that the lease has not been discharged and that the trustee is entitled to prove in the liquidation of the company for whatever be the proper sum in sterling, a matter with which I shall have to deal later in this judgment.

The amount for which the trustee is entitled to prove should be ascertained as follows: There must first be ascertained what is due to the trustee under the lease. Expressed in dollars this consists of (1) sums due under clause First I (a) and First II of the lease, and (2) what upon inquiry shall be found to be the correct sum in dollars under paragraph 2 (b) and (c) of the proof. As regards the premium of 2½ per cent. on the face value of the certificates, this arises under the agreement and not under the lease, and should not be taken into account at this stage of the calculation. Then the dollars must be converted into sterling. As regards principal, this represents eleven instalments of rental, and so each instalment should be converted at the rate of exchange obtaining when it fell due. As regards the first claim for interest, this represents interest payable under the lease and therefore payable half-yearly on February 14 and August 14 of each year. Therefore, the total sum claimed under this head should be broken down into half-yearly amounts and converted at the rate of exchange obtaining on the respective dates when each half-yearly payment should have been made. The second claim for interest is really a claim for rent on the basis of holding over. I think, therefore, that, for purposes of conversion into sterling, the same method should be adopted as for the first claim for interest. The sums making up what is found to be the correct figure under paragraph 2 (b) must be converted into sterling at the rate obtaining on the respective dates of payment, while the sum found due under paragraph (c) must be converted into sterling at the rate obtaining at the commencement of the winding up, namely, March 4, 1954. If, of course, any of the items comprised in sub-paragraph (b) were incurred in sterling, there will be no need to convert into dollars and then back to sterling.

The sum resulting from the above calculation will represent the sum for which the trustee is entitled to prove in the liquidation. But, of course, as the trustee is a trustee, it can only receive in respect of its proof a sum sufficient to satisfy the proper claims of the certificate holders. In this regard I think that Mr. Wilberforce is right in his submission that the principle underlying the decision in *In re Chesterman's Trusts* [34] applies. I do not see how otherwise to deal with the matter. The proper course, therefore, is to ascertain the sum in dollars to which the certificate holders are entitled for principal, outstanding interest and the premium of 2½ per cent. To that total must be added the sums found due under subparagraphs (b) and (c) of paragraph 2 of the proof. Then there must be ascertained the amount of sterling which would have been required at the date of the liquidation to purchase the aggregate amount of dollars so ascertained. This total will represent the maximum amount which the trustee on behalf of the certificate holders can receive in respect of the sum proved for. How much the trustee will in fact receive will depend on the dividend payable in respect of the sum proved for.

What I have said in this judgment up to this point would be sufficient to dispose of the whole matter, but, in case the matter should be taken to the Court of Appeal, there was canvassed before me the incidence of the law of Cuba, upon the alternative bases either (1) that the main point fell to be determined by reference to the law of Cuba and that the situs was Cuba, or

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[34] [1923] 2 Ch. 466.

(b) that the main point fell to be determined by the proper law of the contract and the proper law was Cuban law.

In those circumstances it is only right that I should express my view on, at any rate, the main points of Cuban law which have been debated before me. [His Lordship then dealt with the main points of Cuban law and concluded:] Finally, I would say that, taking the view that clauses eleventh and twelfth of the lease and the agreement have the limited effect which I have placed upon them, and accepting the view of Dr. Gorrin (an expert on Cuban law) that under Cuban law the law of Pennsylvania would be held to be the proper law of the contract, then, on the assumption that Cuban law applied in this case, my conclusion as to the right of the trustee to prove in the liquidation of the company would be the same as that to which I have arrived earlier in this judgment, before I proceeded to consider the law of Cuba at all.

There remain to be considered the two further claims which Mr. Wilberforce put forward as alternative to his main claim in contract. The first is a claim for damages for conversion. His contention is that the trustee was, on December 1, 1953, the owner of the rolling stock, and that therefore the act of the company in selling it without the consent of the trustee amounted to conversion. I have held earlier in this judgment that the transfer of the rolling stock by the car company to the trustee was valid under Cuban law, the company at the end of the original transaction being in the position of a bailee of the rolling stock. It is not disputed, as I understand the evidence, that on December 1, 1953, the trustee had the right to possession of the rolling stock (assuming my views of the relevant Cuban law are correct) notwithstanding the appointment of the intervenor.

In those circumstances I accept the view of Dr. Gorrin that the sale and transfer of the rolling stock to the Cuban State was unjustifiable under Cuban law. The sale was a tort under English law: it was a conversion by a wrongful sale. Mr. Megaw relied on *Tancred* v. *Allgood*.[35] Upon examination, however, I agree with Mr. Wilberforce that this was not a case of conversion at all. It was an action against the sheriff and not against the bailee. In Halsbury's Laws of England, 2nd ed., vol. 33, p. 63, note (1), it is treated as a case of trespass, and I think rightly.

What, then, is the measure of damages? Mr. Megaw relied on *Belsize Motor Supply Co.* v. *Cox*[36] for the proposition that where the bailee has an interest in the property, the measure of damages is not the full value of the thing converted, but only the value of the owner's interest therein. Mr. Wilberforce accepted this proposition, and that the company had an interest in the rolling stock; but, invoking *Belsize Motor Supply Co.* v. *Cox*,[37] he contended that the interest of the trustee in the rolling stock at the date of conversion was the amount of the payments which would have had to have been made by the company under the lease in order to make itself full owner of the rolling stock. In my view this is the correct formula for calculating damages on this claim in conversion. If the trustee were to prove under this head of claim, then in my judgment it would be entitled to prove for such a sum in sterling as when converted into dollars at the rate obtaining on December 1, 1953, would produce the amount of dollars resulting from the application of the formula to which I have just referred.

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[35] (1859) 4 H. & N. 438.

[36] [1914] 1 K.B. 244.

I come now to the last point, the claim for damages for breach of the covenant in clause fifth of the lease against assignment of the rolling stock without the consent of the trustee. I approach this claim on the basis that the property in the rolling stock effectively passed to the trustee in 1921 and that the covenants in the lease did not cease to be binding by virtue of the so-called resale agreement in 1922. I therefore come to the conclusion that by the sale of December 1, 1953, which admittedly was made without the consent of the trustee, the company committed a breach of the covenant in question. As regards the question of damages, Mr. Megaw submitted that the phrase "its right or "interest" in clause fifth refers only to its reversionary interest in the lease, and that therefore the act of the company can have resulted in no damage to the trustee. This appears to me to be putting much too narrow a construction on the clause. The document is a commercial document and must be construed so as to give business efficacy to it. I am unable to credit that the parties could have intended to confine the operation of the covenant to the company's reversionary interest. The clause is clearly introduced for the protection of the trustee, who, unless its permission is first obtained, is entitled to insist that the company shall remain the lessee under the lease and shall not be entitled to substitute any other person. In other words, the clause is dealing with the whole of the company's interest as lessee and not merely with its so-called reversionary interest. I do not, therefore, regard this as a claim for which only nominal damages should be awarded. To ascertain the quantum of damage one should ascertain the position which would have resulted if the clause had been complied with, and the consent of the trustee had been given. In such circumstances, the trustee should have been joined in the sale, in which case it would have received that portion of the purchase price properly attributable to the rolling stock. As I have mentioned earlier, the company valued the rolling stock for insurance purposes in July, 1953, at $2,000,000. I see no reason to treat it as being of any less value in December, 1953. I have no evidence as to the rate of depreciation; while on the other hand the evidence shows that the company in July, 1953, was cutting down its insurance commitments so far as it possibly could. It must, I think, be a reasonable inference that the sum of $2,000,000 was the lowest which could properly be placed on the rolling stock in July, 1953. If the trustee were to prove under this head of claim, then in my judgment it would be entitled to prove for such a sum in sterling as when converted into dollars at the rate of exchange obtaining on December 1, 1953, would produce $2,000,000.

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[37] [1914] 1 K.B. 244.

Finally, I should observe that if the trustee were to prove under either of the last two heads, the maximum sum which it could retain would be the sum required to satisfy the claims of the certificate holders calculated as set out earlier in this judgment. In the result, the trustee has the choice of proving under one of three heads.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Norton, Rose & Co.*

P. P.

1958
Jan. 24.

Wynn-Parry J.

In re WHITE, DECD.
McCANN AND ANOTHER *v.* HULL AND ANOTHER.

[1957 W. 1144.]

Will — Construction — "Business" — Bequest of "business of a house "furnisher"—What assets comprised in and liabilities payable out of bequest.

By his will made in 1952 a testator bequeathed substantial legacies and continued: "7. I give and bequeath the business of "a house furnisher at present carried on by me at 64 Myddleton

"Road, Bowes Park, . . . as to two-thirds to my wife M. absolutely and as to the other one-third to H. (in consideration of "her long and faithful service) for their own use and benefit "absolutely and it is my wish that the said H. shall carry on and "manage the business as she shall think fit. 8. Subject to the "payment of my funeral and testamentary expenses I give, devise "and bequeath all the real and personal estate not hereby or by "any codicil hereto otherwise specifically disposed of and which I "can dispose of by will to my said wife M. absolutely." In 1956 the testator died. By this summons, taken out in 1957, the executors asked, inter alia, what the bequest of the testator comprised and whether it was subject to the payment of the testator's trade liabilities at his death and of the income tax payable in respect of the profits of the business down to his death:—

Held, that the bequest of the business did not include the testator's bank balance, but included the stock-in-trade, the book debts and the freehold property at Bowes Park, and was subject to the payment of the testator's trade liabilities at his death, but not to the payment of the income tax payable in respect of the profits of the business down to his death, as:

(1) The court could conclude, from the expressed wish that H. should carry on the business, that clause 7 of the will ought to be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow that wish to be achieved.

In re Rhagg [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314 applied.

(2) The same reasoning applied to the trade liabilities as to the trade assets, the business being regarded as an entity.

In re Timberlake (1919) 63 S.J. 286; *In re Harland-Peck* [1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347 considered.

Dictum of Simonds J. in *In re Rhagg* [1938] Ch. 828, 836; 54 T.L.R. 990, 992; [1938] 3 All E.R. 314, 318, that "the substance "of the bequest is the assets of the business subject to its liabilities" followed.

(3) Taking the profits down to the testator's death to be confined to the amount assessed on him under Schedule D in respect of the profits to which he had become entitled through carrying on the business, the tax must be regarded as entirely personal to him and should not be paid out of the business assets.

ADJOURNED SUMMONS.

By his will dated July 18, 1952, a testator, Horace Smith White, provided: "2. I appoint my daughter Phyllis Margaret "McCann and Leslie Vernon Muskett . . . executors of this my "will. 3. I give to each of my above-named executors who shall "prove my will the sum of £50. 4. I give to my wife Margaret all "my personal chattels and household goods and effects free of "duty. 5. I give to each of my grandchildren living at my death "the sum of £10 free of duty. 6. I give and bequeath a legacy of

" £250 each free of duty to Ivy Constance Oliver, Horace Samuel " White, Nancy Ellen Price, Molly White and Phyllis Margaret " McCann. 7. I give and bequeath the business of a house " furnisher at present carried on by me at 64 Myddleton Road, " Bowes Park . . . as to two-thirds to my wife Margaret absolutely " and as to the other one-third to Bessie Amy Hull (in considera- " tion of her long and faithful service) for their own use and " benefit absolutely and it is my wish that the said Bessie Amy " Hull shall carry on and manage the business as she shall think " fit. 8. Subject to the payment of my funeral and testamentary " expenses I give, devise and bequeath all the real and personal " estate not hereby or by any codicil hereto otherwise specifically " disposed of and which I can dispose of by will to my said wife " Margaret absolutely." On July 13, 1956, the testator died.

Miss Hull and the testator's widow could not agree what assets were comprised in the gift in clause 7 of the will; and on May 3, 1957, Mrs. McCann and Mr. Muskett, the executors, took out this summons to ascertain: 1. Whether the bequest of the business of a house furnisher in clause 7 included (i) all or part of a sum of £6,660 6s. 2d. in the testator's account at Bowes Park branch of Barclays Bank at the date of his death; (ii) stock-in-trade; (iii) book debts amounting to £608 8s. 9½d.; (iv) moneys owing by trade debtors or any part thereof; (v) a sum of £252 10s. 8d. representing part of the proceeds of sale of a business of house furnishing formerly carried on by the testator at Wood Green; (vi) the freehold property at Myddleton Road, Bowes Park: 2. Whether the bequest of the business at Bowes Park was subject to the payment thereout: (i) of the testator's trade liabilities at his death amounting to £1,247 7s. 6d.; (ii) of the income tax payable in respect of the profits of the business down to the testator's death.

Affidavit evidence was given that the testator bought the Bowes Park business in 1922 and bought the freehold in 1943; that he bought the Wood Green business (of a general draper) in March, 1954, adding to its original stock a stock of furniture and floor coverings in the hope of developing a business of that character there, and that he sold that business in March, 1956, thereupon transferring the remainder of that stock of furniture and floor coverings to the Bowes Park business.

John Monckton for the executors.

G. B. H. Dillon for Miss Hull. On the first question, Miss Hull gives up all claim to the amount standing to the testator's credit at Barclays Bank at his death and to the sum representing part of the proceeds of sale of the Wood Green business. She does, however, claim the stock-in-trade, the book debts and the freehold property at Bowes Park. As the testator expressed the wish that she should carry on and manage the business, the gift to her should, in accordance with the authorities, be construed generously and broadly to include at least what is necessary to enable her so to do. [Reference was made to *In re Barfield* [1] and *In re Rhagg.*[2]]

B. A. Bicknell for the widow. Not only did the testator leave, by clause 4, to his widow his personal chattels, household goods and effects, but, by clause 8, he gave her his residue after bequeathing, by clause 6, five pecuniary legacies of £250 each free of duty. He must have meant both provisions to take effect, i.e., must have meant the pecuniary legacies to be paid in full and the widow to be paid something under the residuary gift. The testator's account at Bowes Park branch of Barclays Bank was not an account intended to show what did and did not belong to his business, but was an account kept by him for income tax purposes. Miss Hull has already renounced all claim to cash at the bank, and it is at least open to doubt whether the item "stock-in-trade" constitutes assets of the business. Some, at any rate, of it was used to start the Wood Green branch.

WYNN-PARRY J. The first question with which I have to deal on this summons concerns the content of a bequest by the testator of "the business of a house furnisher at present carried "on by me at 64 Myddleton Road, Bowes Park." The items in dispute are conveniently listed in the summons. The first relates to a sum of £6,660 6s. 2d., standing to the credit of the testator's account with Barclays Bank Ltd., Bowes Park branch, at the date of his death. On the evidence, which shows that the testator had only one banking account and used that banking account sometimes for the purpose of the business and sometimes for his private purposes, counsel for the first defendant has (in my view very properly) abandoned any claim to that amount on behalf of the first defendant, who is a co-beneficiary with the second defendant of the gift of the business. Similarly, he has abandoned any claim to an item appearing in the balance sheet as at July 13, 1956, of

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[1] (1901) 84 L.T. 28.

[2] [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314.

£252 10s. 8d. opposite the legend "Private loan account." It is with the remaining items that I have to deal.

Before I come to them, it is, I think, necessary to advert shortly to the terms of the will, because both counsel for the first and counsel for the second defendant have asked me to consider the content of this gift having regard to the other provisions in the will. The testator, having appointed his executors, proceeds in clause 3 to give £50 to each of them; he then, by clause 4, gives to his wife (the second defendant) all his personal chattels and household goods and effects free of duty; he gives to each of his grandchildren £10 free of duty, and by clause 6 he gives a number of pecuniary legacies which amount to £1,250. Then, in clause 7, comes the gift of the business: "I give and bequeath the business of a house furnisher "at present carried on by me at 64 Myddleton Road, Bowes "Park . . . as to two-thirds to my wife Margaret absolutely and "as to the other one-third to Bessie Amy Hull (in consideration "of her long and faithful service) for their own use and benefit "absolutely and it is my wish that the said Bessie Amy Hull "shall carry on and manage the said business as she shall think "fit." Then comes the residuary gift by which everything else is given to the widow, the second defendant.

The question what is the content of the gift of the business is not free from judicial authority. The authorities were exhaustively reviewed by Simonds J. in *In re Rhagg*,[1] and I think that it is not inaccurate to say that a perusal of that review and of the authorities comprised in the review shows that over the time which has elapsed from the earlier cases the court is inclined to take a much broader view than used to be taken, although, of course, it remains as true as ever that each case has to be decided by reference to its own particular facts and the particular language of the will in question. It is also true, as counsel for the second defendant in the present case emphasized, that in effect what Simonds J. was dealing with was the interest of the particular testator in a share of the partnership in question. He had been the sole owner of the business and had made his will bequeathing the business to his clerk, whom he later made his partner; but, as I read the judgment, the judge used or referred to the circumstance that before his death he had brought a partner in only so as accurately to define that with which he was dealing. There are certain observations to be found in the judgment which

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[1] [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314.

I read as intended to be of general application and as intended to represent the reasons underlying the conclusion to which the judge came. In the course of his judgment, he said [2]: "I have "now reviewed all the decided cases which can throw any light "on the question before me. They leave me, I think, free to "form my own judgment on the words of this will. I must in "the first place reject the contention of the residuary legatees "that nothing more than the testator's share of goodwill passed "under the bequest. It appears to me an arbitrary and unjustifi- "able selection of a particular asset among the several assets of "which a business is made up. The word 'business' in such a "context as this bears much the same meaning as when it is "said that a man has sold his business. It means the under- "taking or enterprise itself, not the process of carrying it on. "When, therefore, a solicitor bequeaths his business, or as the "bequest must in the present case be read, his share of the "business carried on by him in partnership with another, I see "no reason for saying that goodwill rather than any other asset "passes. If anything passes which is an asset of the business, "why should not everything pass which is an asset of the "business? And equally if a share in one asset passes, why not "a share in all?" Later he said [3]: "I find the same difficulty "which Farwell J. found in *In re Barfield* [4] in excluding anything "which was, in fact, treated by the testator as an asset of his "business. While he carried on business by himself alone he "treated as such an asset certain sums which he had advanced "to clients actual or potential. These sums were, I think, to "him as much the assets of his business as plant and stock would "to a manufacturer be the assets of his business. I see no "reason to attribute any change on his taking Boyd into partner- "ship. They remained assets of the partnership business, with "the result that the testator is, as a matter of account between "himself and his partner, to be regarded as having a sum due "to him on capital account of the necessary amount."

With that guidance, I return to the consideration of the items in dispute. They are the stock-in-trade of the business, book debts amounting to £608 8s. 9d., moneys owing by trade debtors or any part thereof, and, lastly, the freehold property at 64 Myddleton Road.

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[2] [1938] Ch. 828, 835.

[3] Ibid. 837.

[4] (1901) 84 L.T. 28.

Counsel for the second defendant urged on me this consideration: she pointed out that the testator, in addition to giving the second defendant, his wife, all his personal chattels, household goods and effects, bequeathed a number of pecuniary legacies which amount to a substantial sum, as I have already pointed out, and gave his residue to his wife, the second defendant. Counsel asked me to draw from that the inference that he intended those gifts to result in the pecuniary legatees' receiving their legacies and the second defendant's receiving something under the residuary bequest. I quite appreciate the purpose of that submission; but I think, from a somewhat lengthy experience, that I am entitled to take into consideration that testators are very often optimistic and in disposing of their property are frequently far more generous than the amount of the property to be disposed of will effectively allow. So far as the residuary estate is concerned, residue is what it implies, namely, that which remains, if anything.

On the other hand, counsel for the first defendant, Miss Hull, pressed on me the closing words of clause 7: " . . . and it is " my wish that the said Bessie Amy Hull shall carry on and " manage the said business as she shall think fit." I think that that direction in the will is a much stronger indication than that which is afforded by reference to the amount of the pecuniary legacies and the existence of a residue. The gift of residue is common form. A will would be sadly lacking if it did not contain a residuary clause; but in this will there is ~~an~~ express statement of wish that Miss Hull should carry on and manage the business. I think that I am entitled to draw from that the conclusion (and I think it is in accordance with the trend of the modern authorities) that a broad rather than a narrow construction should be given to the bequest of " the business of a house furnisher at " present carried on by me at 64 Myddleton Road "; in other words, that clause 7 should be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow the obvious wish of the testator to be achieved, namely, that the business should be carried on. Were I to accede to the argument put forward on behalf of the widow, there would pass only a motor-van of the value at the testator's death of £193 15s. 0d., a cash register which, taking into account the amounts written off, is of the value of £30, and the goodwill. That appears in the testator's balance sheet at £25, but I will assume for the purpose of my judgment that it is worth considerably more than that.

It is perfectly true, as counsel for the second defendant pointed out and the evidence shows, that the account kept by the testator was really an account for income tax purposes, and that is one of the reasons why counsel for the first defendant was constrained to give up any claim to the item " Cash at Bank "; nevertheless, it is possible in perusing these items in the light of the evidence which has been filed on this summons to say which items the testator treated as part of his business. The second item, stock-in-trade £6,141 14s. 0d., is to be regarded, in my view, as part of the assets of the business. The evidence shows that the great bulk of that item comprised stock which was used in the business at 64 Myddleton Road. There is some dispute about stock which was used in another business, but I think that matter is cleared up by the evidence of Miss Hull and of Mr. White, the testator's son. She says in her affidavit: " There " was only one business, the business of a house furnisher, and " Wood Green "—that was where the other business was carried on—" was for a time a branch of that business. Stock was taken " from 64 Myddleton Road to start the Wood Green branch, " and when the Wood Green premises were sold the balance of " stock then at Wood Green was naturally brought back to " 64 Myddleton Road and mixed with the stock then at " 64 Myddleton Road. Thenceforth all the stock was used interchangeably for the purposes of the business then carried on at " 64 Myddleton Road." If that be right, it seems to me that there is no way of separating the stock which came from Wood Green from that which was already at Myddleton Road.

Mr. White disputes that the business at Wood Green was a branch of the business at Myddleton Road, Bowes Park. He says that the business at Wood Green, which the testator purchased as a going concern in March, 1954, was " that of a general " draper selling women's and children's clothes and his purchase " included the stock of a general draper. The testator continued " that business at Wood Green until its sale in March, 1956. " He added to the original stock of the Wood Green business a " stock of furniture and floor coverings, hoping to develop a " business of that character there. When the Wood Green " business was sold, only the remainder of such latter stock was " transferred to the Bowes Park business." So be it. Accepting that, the result is that such of the stock at Wood Green as was suitable for the purpose of a furnishing business was brought back by the testator, to whom solely it belonged, and used in his business at Myddleton Road, Bowes Park. That seems to me to come exactly within what Simonds J. said in *In re Rhagg*,[5] namely, that he shared the difficulty which Farwell J. found in *In re Barfield*[6] "in excluding anything "which was, in fact, treated by the testator as an asset of his "business." So far, then, as the content of the stock is concerned, I see no difficulty from the fact of the introduction of the stock from Wood Green which Mr. White agrees was brought back to the business at Myddleton Road. On the question whether or not that composite stock passes under the gift in clause 7, I take the view that the matter is decided by the force of the closing words of the clause because, if the testator intended that the business should be carried on (as, in my view, he clearly did), it must follow that he intended that the stock-in-trade, which was then part of the business, should pass in order that the business could be carried on, because without that stock-in-trade, steps would have to be taken to procure stock and it seems to me that it would produce a most unnatural result if I construed clause 7 as not including the stock-in-trade.

The next item is under the heading "Sundry debtors, trade "accounts." Those simply are book debts owing to the business; and it seems to me by parity of reasoning that, on the assumption the testator intended the business to be carried on, those are items which must be treated as having been regarded by him as part of his business assets. There remains the item "Freehold "property, at valuation, 64 Myddleton Road, Bowes Park." The evidence is that those premises throughout have been used by the testator to carry on his business there and for no other purpose. They are business premises. At the beginning of his interest in them he held them under a lease, but later purchased the freehold, which fact, if anything, underlines the conclusion that he regarded the freehold property as part and parcel of the assets of his business. Some of the old cases proceed on the basis of excluding such an item, but I can see no reason for doing so in this case. The context which I find on the construction which I have given to clause 7 really demands that they be included; and I again rely on the passage from the judgment in *In re Rhagg*[7] to which I have already referred: "If anything "passes which is an asset of the business, why should not

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[5] [1938] Ch. 828, 837.

[6] 84 L.T. 28.

[7] [1938] Ch. 828, 835.

"everything pass which is an asset of the business?" I can see no reason, therefore, for excluding from the assets of the business the freehold property in question.

Therefore, on question 1 I answer thus: paragraph (i) in the negative; paragraph (ii) and paragraph (iii) in the affirmative. I do not think that paragraph (iv) carries the matter any further, because moneys owing by trade debtors or any part thereof cannot in their content be different from book debts, and those are dealt with under paragraph (iii). Paragraph (v) I answer in the negative and paragraph (vi) I answer in the affirmative.

G. B. H. Dillon for Miss Hull. The bequest of the business does not subject the assets which, the court has just held, pass under clause 7 of the will, to the payment thereout of the testator's trade liabilities at his death or of the income tax payable in respect of the profits of the business down to the date of his death. [Reference was made to *In re Timberlake* [1] and *In re Harland-Peck.*[2]] As to the income tax, it is purely personal to, and payable by, the person liable to it—in the present case the testator. Accordingly, it is not payable out of the assets of the business.

B. A. Bicknell for the widow. The bequest is subject to the payment of those trade liabilities and of that income tax, both of which fall to be paid out of the assets. On any view there is little point in citing *In re Timberlake*,[3] since the estate in that case was insolvent. *In re Harland-Peck* [4] was an appeal against a decision of Farwell J. but did not, in fact, include an appeal against that part of it affecting the point here in issue. Farwell J. there decided that the gift of a business was not the gift of an entity. Uthwatt J., on the other hand, inclined in *In re Abbott*,[5] referred to in an article in the Law Times newspaper of November 8, 1941, to the view that it was, but did not actually decide the point which arises in the present case. In *In re Rhagg* [6] Simonds J. said: "Secondly, I must observe that "somewhat different considerations may be involved where the "business was that of the testator alone and where he carried it "on in partnership. In the former case to speak of his 'capital'

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[1] (1919) 63 S.J. 286.

[2] [1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347.

[3] 63 S.J. 286.

[4] [1941] Ch. 182.

[5] October 6, 1941, unreported.

[6] [1938] Ch. 828, 836.

"in the business or his undrawn profits may be wholly misleading. The substance of the bequest is the assets of the business "subject to its liabilities." True, that is obiter, but the last sentence is precisely and forcefully in point in the present case. It applies exactly to the way in which the testator dealt with his business, the bequest whereof is accordingly subject to payment of the trade liabilities.

WYNN-PARRY J. The last question with which I have to deal relates to two items. The first is the trade liabilities of the testator at the date of his death, amounting to £1,247 7s. 6d., and the question is whether the bequest, in clause 7, of the business subjects the assets which, I have held, passed under the clause, to the trade liabilities.

The authorities are not in a satisfactory state. The first case to which I was referred, *In re Timberlake*,[1] concerned, so far as one can discover from the report, an estate that was insolvent, and, as counsel for the second defendant observed and I agree, in those circumstances the question whether the bequest of the business subjected it to debts would appear to have been somewhat academic. The later case to which I was referred, *In re Harland-Peck*,[2] also is unsatisfactory from the point of view of this question, because it is a report of the case in the Court of Appeal from a judgment of Farwell J., who decided two points, the first being one against which no appeal was made, namely, the question whether a gift of the business in that case was subject to the liabilities. I have no indication in the report on what line of reasoning Farwell J. proceeded.

My attention has been drawn to an article in the Law Times newspaper of November 8, 1941, where reference is made to an unreported case of *In re Abbott*,[3] in which Uthwatt J. is stated to have expressed the view that it seemed wrong that the legatee of the business should take it free from the liability to pay debts. He inclined to the view which Farwell J. had rejected, namely, that the gift of a business was the gift of an entity. He, however, did not decide the point, having regard to the unusual circumstances surrounding the gift in *In re Abbott*.[3]

There is a passage which I agree must be treated as obiter in the judgment of Simonds J. in *In re Rhagg*,[4] where he says:

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[1] (1919) 63 S.J. 286.

[2] [1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347.

[3] October 6, 1941, unreported.

[4] [1938] Ch. 828, 836.

"Secondly, I must observe that somewhat different considerations may be involved where the business was that of the testator alone and where he carried it on in partnership. In the former case to speak of his 'capital' in the business or his undrawn profits may be wholly misleading. The substance of the bequest is the assets of the business subject to its liabilities."

It is true that *In re Timberlake*[5] was not cited in *In re Rhagg*,[6] and that *In re Harland-Peck*[7] had not been decided. I take it that, if there be no special circumstances, I should follow what I can deduce to be the rule, if any, appearing from *In re Timberlake*[8] and apparently applied in *In re Harland-Peck*[9]; but, of course, as Simonds J. said in *In re Rhagg*,[10] having completed an exhaustive review of the authorities: "They leave me, I think, free to form my own judgment on the words of this will." I find myself in just the same position.

The key to the whole problem, in my judgment, is again to be found in the latter words of clause 7. In my view, this is a case where the business should be regarded as an entity, and it is a case where the words of Simonds J. apply[11]: "The substance of the bequest is the assets of the business subject to its liabilities." I arrive at that conclusion for the short reason that it appears to me that, on its true construction, clause 7 contemplates a continuation of the business, lock, stock and barrel, as it existed at the date of the death of the testator. It is true that the accounts are not confined merely to accounts of the business; but, as I have said earlier, it is easy to extract, on analysis, what he treated as assets of the business and what he did not. In my view, he clearly treated the amount of the trade accounts as charged on what he regarded as his business assets. Therefore, in my view, the answer to the first point raised by question 2 is that the bequest is subject to the payment of the trade liabilities mentioned in paragraph (i).

The second point relates to the income tax payable in respect of the profits of the business down to the testator's death. I take those to be confined to the amount assessed on the testator under Schedule D in respect of the profits to which he had become entitled through carrying on the business. The amount involved is, I think, very small. In my view, on a question so framed, that tax must be regarded as entirely personal to the testator and should not be paid out of the assets of the business.

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[5] 63 S.J. 286.
[6] [1938] Ch. 828.
[7] [1941] Ch. 182.
[8] 63 S.J. 286.
[9] [1941] Ch. 182.
[10] [1938] Ch. 828, 835.
[11] Ibid. 836.

Declaration accordingly.

Solicitors: *Frank E. C. Forney; Bailey, Breeze & Wyles; Chatterton & Co.*

K. R. A. H.

1957
Dec. 11, 12, 20.

Upjohn J.

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom—Assessments to income tax on life fund interest—Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. I, Sch. D, rules applicable to Case III, r.* 3*—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 430*—Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order,* 1947 (*S.R. & O.* 1947, *No.* 806), *Sch., art. II* (1) (*i*), (3); *art. III* (2), (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a branch office in London, in the United Kingdom. For the years 1947–48 to 1953–54 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund "interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1]

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[1] Income Tax Act, 1918, Sch. I, Sch. D: "Case III. Tax in respect "of profits of an uncertain value and "of other income described in the "rules applicable to this Case . . . "r. 3: (1) Where an assurance company not having its head office in "the United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the company from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent provided in this rule, be deemed to be "profits comprised in this Schedule "and shall be charged under this "Case. (2) Such portion only of the "income from the investments of the "life assurance fund for the year "preceding the year of assessment "shall be so charged as bears the "same proportion to the total income "from those investments as the "amount of premiums received in "that year from policy holders resident in the United Kingdom and

The taxpayer appealed and the special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to

"from policy holders resident abroad "whose proposals were made to the "company at or through its office "or agency in the United Kingdom "bears to the total amount of the "premiums received by the company. "... (3) Every such charge shall be "made by the special commissioners "as though the company under the "provisions of this Act had required "the proceedings relating to the "charge to be had and taken before "those commissioners. (4) Where a "company has already been charged "to tax, by deduction or otherwise, "in respect of its life assurance "business, to an amount equal to or "exceeding the charge under this "rule, no further charge shall be "made under this rule, and where "a company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sch., art. II: "(1) In the present "agreement, unless the context other-"wise requires . . . (i) the term "'industrial or commercial enterprise "'or undertaking' includes an enter-"prise or undertaking engaged in . . . "the business of . . . insurance, "life insurance or dealing in invest-"ments, and the term 'industrial or "'commercial profits' includes profits "from such . . . business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remunera-"tion for personal services. . . . "(3) In the application of the pro-"visions of the present agreement "by one of the Contracting Govern-"ments any term not otherwise "defined shall, unless the context "otherwise requires, have the mean-"ing which it has under the laws of "that Contracting Government relat-"ing to the taxes which are the "subject of the present agreement."

Art. III (2): "The industrial or "commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment "situated therein. If it is so "engaged, tax may be imposed on "those profits by the United King-"dom, but only on so much of them "as is attributable to that permanent "establishment: Provided that "nothing in this paragraph shall "affect any provisions of the law of "the United Kingdom regarding the "imposition of excess profits tax and "national defence contribution in the "case of interconnected companies. "(3) Where an enterprise of one of "the territories is engaged in trade "or business in the other territory "through a permanent establishment "situated therein, there shall be "attributed to that permanent estab-"lishment the industrial or com-"mercial profits which it might be "expected to derive in that other "territory if it were an independent "enterprise engaged in the same or "similar activities and its dealings "with the enterprise of which it is "a permanent establishment were "dealings at arm's length with that "enterprise or an independent enter-"prise; and the profits so attributed "shall be deemed to be income "derived from sources in that other "territory. If the information avail-"able to the taxation authority con-"cerned is inadequate to determine "the profits to be attributed to the "permanent establishment, nothing "in this paragraph shall affect the "application of the law of either "territory in relation to the liability "of the permanent establishment to "pay tax on an amount determined "by the exercise of a discretion or "the making of an estimate by the "taxation authority of that territory: "Provided that such discretion shall "be exercised or such estimate shall

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notional profits of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that

"be made, so far as the information "available to the taxation authority "permits, in accordance with the "principle stated in this paragraph."

Income Tax Act, 1952, s. 430: "(1) Where an assurance company "not having its head office in the "United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com- "pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent pro- "vided in this section, be deemed to "be profits comprised in Schedule D "and shall be charged under Case "III thereof. (2) Such portion only "of the income from the investments "of the life assurance fund for the "year preceding the year of assess- "ment shall be so charged as bears "the same proportion to the total "income from those investments as "the amount of premiums received "in that year from policy holders "resident in the United Kingdom "and from policy holders resident "abroad whose proposals were made "to the company at or through its "office or agency in the United King- "dom bears to the total amount of "the premiums received by the com- "pany: Provided that in the case of "an assurance company having its "head office in any part of Her "Majesty's dominions outside the "United Kingdom, in India or in "the Republic of Ireland, the Com- "missioners of Inland Revenue may, "by regulation, substitute some basis "other than that prescribed in this "subsection for the purpose of ascer- "taining the portion of the income "from investments to be so charged "as being income derived from busi- "ness carried on in the United "Kingdom. (3) Every such charge "shall be made by the Special Com- "missioners as though the company "had, under this Act, required the "proceedings relating to the charge "to be had and taken before those "Commissioners. (4) Where a com- "pany has already been charged to "tax, by deduction or otherwise, in "respect of its life assurance busi- "ness, to an amount equal to or "exceeding the charge under this "section, no further charge shall be "made thereunder, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced. (5) Where, by virtue of "this section, an assurance company "is charged under Case III of "Schedule D on a proportion of the "income from the investments of its "life assurance fund or on a basis "substituted therefor, the relief under "section 425 of this Act in respect "of expenses of management shall "be calculated by reference to a like "proportion of its total expenses of "management for the year, estimated "according to the provisions of this "Part of this Act. (6) Subsection (3) "of section 131 of this Act (which "provides that income chargeable "under Case III of Schedule D may "in certain cases be assessed and "charged in one sum) shall not apply "to tax in respect of income to "which subsection (1) of this section "applies."

the order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer:—

Held, in upholding the determination of the commissioners and dismissing the appeal, that the taxpayer's taxable surpluses were properly described as "industrial or commercial profits" for the purposes of the order of 1947, which accordingly applied.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600 applied.

New York Life Insurance Co. v. *Styles* (1889) 14 App.Cas. 381; 5 T.L.R. 621 considered.

APPEAL from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated, so far as material, provided:

At a meeting of the commissioners held on July 23 and 24, 1956, the taxpayer, Australian Mutual Provident Society, appealed against assessments to income tax in the sum of £100,000 for each of the years 1947–53 inclusive and in the sum of £50,000 for the year 1953–54. The assessments were made in respect of "life fund interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, in so far as they related to the years of assessment 1947–48 to 1951–52 inclusive and section 430 of the Income Tax Act, 1952, so far as they related to the years of assessment 1952–53 and 1953–54. The grounds of the appeal were that the assessments were not competent in law, having regard to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The taxpayer was a mutual provident society established in New South Wales, Australia, in 1849, incorporated there in 1857 and at the date of these proceedings governed by the Australian Mutual Provident Societies' Acts, 1910 and 1941, and at all material times carried on a life assurance business including the granting of annuities and was an assurance company to which the Assurance Companies Act, 1909, applied. It was a mutual society resident in Australia, its head office being in Sydney, New South Wales, and it carried on business in Australia and New Zealand and also in the United Kingdom through a branch office in King William Street, London. It was common ground that the taxpayer was not resident in the United Kingdom for income tax purposes, but its circumstances were exactly covered by rule 3 of Case III of Schedule D, and for the years of assessment before 1946–47 it had been properly assessed to United Kingdom income tax under that rule, i.e., on a proportion of its income from the investments of its life assurance fund (excluding the annuity fund) which by virtue of rule 3 had been deemed to be profits comprised in Schedule D and chargeable under Case III. The taxpayer was granted dominion income tax relief under section 27 of the Finance Act, 1920. It was also common ground that from 1946–47 onwards, by virtue of section 51 of the Finance (No. 2) Act, 1945, and of the order of 1947 the taxpayer could no longer claim relief under section 27 of the Act of 1920.

The taxpayer contended:

(i) That by section 51 of the Act of 1945 (and section 347 of the Act of 1952) the order of 1947 had effect in relation to income tax so far as it provided for (a) charging income arising from sources in the United Kingdom to persons not resident therein; (b) determining the income to be attributed to those persons and their agencies, branches or establishments in the United Kingdom; and that those provisions had that effect notwithstanding anything in any enactment;

(ii) that by article III (2) of the order of 1947 where an Australian enterprise was engaged in trade or business in the United Kingdom through a permanent establishment situated therein, as was so in the present case, United Kingdom income tax might be imposed on only so much of its profits as was attributable to that permanent establishment and that, by article III (3) thereof, the amount of its profits to be attributed to such a permanent establishment was defined to be that amount of industrial or commercial profits which that permanent establishment might be expected to derive in the United Kingdom were it an independent enterprise engaged in activities the same as or similar to those in which the Australian enterprise was in fact engaged and its dealings with the Australian enterprise were at arm's length;

(iii) that rule 3 of Case III of Schedule D to the Act of 1918 (as was made clear by the speeches delivered in the House of Lords in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*[2]) and section 430 of the Act of 1952 were charging rules which imposed a charge of United Kingdom income tax not on the actual or estimated profits of a branch office through which a non-resident assurance company carried on business in the United Kingdom but on a purely notional or conventional figure;

(iv) that amounts computed for the purposes of the assessments according to rule 3 of Case III of Schedule D (and to section 430 of the Act of 1952) represented purely notional or conventional figures in accordance with those rules and bore no relation whatever to the amount of industrial or commercial profits which a permanent establishment might be expected to derive in the United Kingdom in the circumstances mentioned in article III (3) of the order of 1947, which latter amount was, by the combined effect of that order and of section 51 of the Finance (No. 2) Act, 1945 (section 347 of the Income Tax Act, 1952) the only amount on which income tax might be charged;

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[2] [1947] A.C. 605; [1947] 1 All E.R. 600.

(v) that the taxpayer was a mutual society carrying on the trade or business of life assurance exclusively with its members so that the surplus arising from that trade or business did not yield any profit assessable to United Kingdom income tax and that, had its permanent establishment in the United Kingdom been an independent enterprise engaged in that same activity of carrying on the trade or business of life assurance exclusively with its members and dealing exclusively with the taxpayer, the taxable profits which it might have been expected to derive from that mutual trade or business would have been nil;

(vi) that the assessments under appeal were not competent in law;

(vii) that the appeal should be allowed and the assessments discharged.

The Crown contended:

(i) That the order of 1947 did not remove or supersede the charge to United Kingdom income tax made by rule 3 of Case III of Schedule D (and section 430 of the Income Tax Act, 1952);

(ii) that, at the most, the order of 1947 laid down a condition which had to be satisfied before any charges on profits provided for by the Income Tax Acts might be imposed and put a limit on the extent to which those charges might be imposed.

(iii) that the taxpayer's circumstances were such that the conditions imposed by article III (2) and (3) of the order of 1947 were satisfied;

(iv) that the assessments under appeal were therefore competent in law;

(v) that the appeal should be dismissed and the assessments adjusted in accordance with the facts.

The commissioners decided as follows in paragraph 6 of the case:

(5) The taxpayer, being a mutual society, was prima facie not liable to income tax on the surplus arising from business done with its members. It had no profits or gains which fell to be

assessed under Case I of Schedule D: *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association Ltd.*[3]; *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.*[4] Rule 3 of Case III was a charging rule (*Inland Revenue Commissioners* v. *Australian Mutual Provident Society*[5]) which sought to charge an insurance company, not having its office in the United Kingdom, which carried on life assurance business, mutual or otherwise, through a branch or agency in the United Kingdom, a condition which it was admitted exactly fitted the taxpayer's present case. The charge was based not on the actual profits or on the commercial or industrial profits, if any, of the insurance company or its branch but on a notional sum deemed to be "profits," comprised in Schedule D and chargeable under Case III, arrived at by reference to a proportion of the income of the company from the investments of its life assurance fund (excluding the annuities fund, if any) wherever received. It was on that basis that the taxpayer had been assessed to United Kingdom tax for years before 1946–47. Section 51 of the Finance (No. 2) Act, 1945, authorized the arrangements comprised in [the order of 1947] in these terms: ". . . the arrangements shall, notwithstanding "anything in any enactment, have effect . . ." The [order of 1947] which was effective for 1946–47 (although the first year of assessment before the commissioners was 1947–48) provided in article III (2) [as already quoted in the case stated]. There again the conditions exactly fitted the taxpayer's case. The commissioners had therefore to find so much of the industrial or commercial profits of the taxpayer as were attributable to its London branch, and article III (3) showed how that was to be done. In the commissioners' opinion there was a clear conflict between the order of 1947 and rule 3 of Case III, which did not purport to deal with the industrial or commercial profits of the taxpayer within the meaning of article III (2) and (3), nor did it provide for the exercise of a discretion or the making of an estimate in accordance with the principles cited in article III (3). The order of 1947 must therefore prevail and the assessments, having been made under rule 3 of Case III and not under article III, were not competent and must be vacated.

(6) Apart from the foregoing, however, in the commissioners' opinion the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to the London

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[3] (1946) 62 T.L.R. 317; [1946] 1 All E.R. 637.

[4] (1952) 33 T.C. 103.

[5] [1947] A.C. 605.

branch which were assessable to United Kingdom income tax, and on that ground also the assessments were to be discharged.

The Crown appealed, and gave to the taxpayer notice in writing that it might contend, as an additional point, that the assessments were outside the order of 1947 because the sums charged to tax were received by the taxpayer as dividends, interest and rents, although they were notionally profits of insurance business.

John Pennycuick Q.C. and *A. S. Orr* for the Crown. Both parties agree that an assessment under rule 3 of Case III is in law an assessment, not on investment income, even though it be measured thereby, but on the profits of the business of life assurance: *Inland Revenue Commissioners* v. *Australian Mutual Provident Society.*[6] In that case the House of Lords did not, apparently, consider *New York Life Assurance Co.* v. *Styles*,[7] in which it had held that a mutual society's trading surplus does not constitute trading "profits" which are chargeable to tax: see also *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association Ltd.*[8] and *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.*[9]

As the matter now stands, the Crown cannot argue against the commissioners' decision on the case as the Crown put it before them. The Crown now submits that the expression "industrial "or commercial profits" in article II (1) (*i*) of the order of 1947 is therein adequately elucidated by the definition of those profits as including "profits from such . . . business," namely, that of ". . . insurance, life insurance or dealing in investments . . ." It follows that article II (3), invocable only where "any term" of the order of 1947 is "not otherwise defined," does not apply, so that the position is that "industrial or commercial profits" means simply what it says—with the result that the profits must be real and actual and must derive from a real and genuine source of profit, and cannot include notional or fictitious profits. Article II of the order applies to profits taxable under Case I, not to notional profits taxed under Case III; and as, in law, there are no real and actual profits in the present case, the order does not apply.

Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer. But for the trend of the authorities it could be convincingly argued that rule 3 is in terms prescribing the taxation of investment income and not that of life assurance business. It provides, in terms, that " any income of the company from the investments " of its life assurance fund . . . shall, to the extent provided in " this rule, be deemed to be profits comprised in this Schedule " and shall be charged under this Case." But for *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*,[10] that would be conclusive in favour of the Crown.

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[6] [1947] A.C. 605.

[7] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

[8] 62 T.L.R. 317.

[9] 33 T.C. 103.

As to the new argument for the Crown, the expression " profits " from such . . . business " is by no means adequately elucidated through definition. " Industrial or commercial profits " are expressly stated not to include " income in the form of dividends, " interest, rents, royalties . . . ," but nowhere in the paragraph is it stated just what those profits are.

The order of 1947 is framed to achieve precisely what its full title implies, i.e., relief against double taxation. Since, on the authorities, an assessment under rule 3 is in English law an assessment on life assurance business profits (albeit an assessment measured by investment income), the " trading surplus " is deemed to be taxable profits and is " industrial or commercial " profits " within the meaning of the order.

Cur. adv. vult.

UPJOHN J. This is an appeal by way of case stated from a decision of the Special Commissioners of Income Tax making assessments to income tax on the taxpayer, the Australian Mutual Provident Society, for the years 1947–48 to 1953–54 inclusive. For the five earlier years the assessments are made under rule 3 of Case III of Schedule D of the Income Tax Act, 1918, and for the last two years under section 430 of the Income Tax Act, 1952. There is no substantial difference between the two Acts for the purposes of this appeal, and the case has been argued before me on the relevant provisions of the Act of 1918 to which alone I shall refer. The whole question is whether the assessments are correct having regard to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947, No. 806), which I shall call the Relief Order.

The relevant facts can be stated in one sentence. The taxpayer is a mutual life assurance society, and has for many years carried on that business (inter alia) from its head office at Sydney in New South Wales where it was incorporated, and in other parts of the world, notably in the United Kingdom where it operates through a branch office in London.

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[10] [1947] A.C. 605.

For the purposes of English income tax the taxpayer's life assurance business is treated as a separate business from other classes of insurance business (see rule 15 of the rules applicable to Cases I and II of Schedule D), and its income from investments is taxed under rule 3 of the rules applicable to Case III of Schedule D which I must read [His Lordship read rule 3 and continued:] The necessary calculations have been made pursuant to the provisions of this rule, and the assessments made accordingly.

Counsel for the taxpayer, with his usual admirable candour, admitted in argument that, apart from authority, there would be much to be said for the view that this rule is, in terms, taxing not the life assurance business of the taxpayer at all but its investment income, and if that be right it is clear from the Relief Order, which I shall read a little later, that the assessments were rightly made, for the Relief Order expressly excludes from its operation income from investments: see article II (1) (*i*).

However, it is not in dispute that an assessment under rule 3 is in law an assessment on profits of the business of life insurance. That was decided by the House of Lords in 1947 in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*,[1] in litigation between the Crown and this taxpayer.

In that case the question arose how income received from securities which were exempt from income tax should be treated in an assessment under rule 3. It seems that in the lower courts both parties proceeded on the footing that tax under rule 3 was a tax on investment income, but there were different views how the rule should be applied. In the House of Lords, however, during the argument it was asked by Viscount Simon [2] why the existence of tax-exempt income affected the application of rule 3, and he added " does the mere fact that it is included as an item in the computation of the profits charged under rule 3 amount to charging it with tax? " It is quite clear from the speeches when judgment was delivered that in the opinion of their Lordships the tax exigible under rule 3 was not a tax on investment income at all but a tax on profits of the business, although measured by investment income.

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[1] [1947] A.C. 605; [1947] 1 All E.R. 600.

[2] [1947] A.C. 605, 611.

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Upjohn J.

It is, of course, a very familiar part of the system of taxation in this country that profits of a particular year of assessment may be and, indeed, usually are, taxed by some yardstick other than the profits of that particular year—for example, as in the old days by reference to an average of three years' profits or as now by reference to a period which may and probably does lie wholly outside the year of assessment. Both parties are agreed that the effect of the speeches in the House of Lords was as I have stated. I do not propose, therefore, to refer to them in any detail, but to content myself with one paragraph from the speech of Lord Wright. Speaking of rule 3 he said[3]: "The "charge was a tax on the investment income only as a machinery "to tax the general profits of the British business, and as a "manner of measuring the charge by an arbitrary figure derived "from a percentage of the investment income." This assessment is on a notional or conventional sum, but nevertheless is an assessment on the profits of the business.

The real difficulty that arises in this case, however, is that as the House of Lords itself decided many years ago in *New York Life Insurance Company* v. *Styles*,[4] a mutual society, that is a society that does business only with its members, does not make profits; its trading surplus accrues to the property of the members, but it is not legally correct to look on the trading surplus as profits of the trade for income tax purposes. This aspect of the matter does not seem to have been discussed in the House of Lords in 1947. Nevertheless, it seems quite plain that apart from the Relief Order a mutual society would be taxable under rule 3, for the rule is clear that income of investments is "deemed to be "profits comprised in this Schedule," and it is always competent for an Act of Parliament to say that for the purpose of income tax a surplus which arises, although not profits, is "deemed to be" so.

I turn then to the Relief Order. Article I (1) of the Schedule to the Order reads: "The taxes which are the subject of the "present agreement are . . . (*b*) in the United Kingdom: the "income tax (including sur-tax), the excess profits tax, and "the national defence contribution (hereinafter referred to as "'United Kingdom tax')." Then I must read some of the definitions in article II (1) of the Schedule: "(1) In the present "agreement, unless the context otherwise requires . . . (*h*) the "terms 'United Kingdom enterprise' and 'Australian enterprise'

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[3] [1947] A.C. 605, 611, 622.

[4] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

" mean respectively an industrial or commercial enterprise or " undertaking carried on by a United Kingdom resident and an " industrial or commercial enterprise or undertaking carried on by " an Australian resident; and the terms 'enterprise of one the " 'territories' and 'enterprise of the other territory' mean a " United Kingdom enterprise or an Australian enterprise, as the " context requires. (*i*) "—and this is the important definition— " The term 'industrial or commercial enterprise or undertaking' " includes an enterprise or undertaking engaged in mining, agri-" cultural or pastoral activities, or in the business of banking, " insurance, life insurance or dealing in investments, and the " term 'industrial or commercial profits' includes profits from " such activities or business but does not include income in the " form of dividends, interest, rents, royalties, management " charges or remuneration for personal services. (*j*) The term " 'permanent establishment,' when used with respect to an enter-" prise of one of the territories, means a branch or other fixed " place of business and includes a management, factory, mine, or " agricultural or pastoral property, but does not include an agency " in the other territory unless the agent has, and habitually " exercises, authority to conclude contracts on behalf of such " enterprise otherwise than at prices fixed by the enterprise or " regularly fills orders on its behalf from a stock of goods or " merchandise in that other territory . . ." I need not read the provisos. Paragraph 3: " In the application of the provisions " of the present agreement by one of the Contracting Govern-" ments any term not otherwise defined shall, unless the context " otherwise requires, have the meaning which it has under the " laws of that Contracting Government relating to the taxes " which are the subject of the present agreement."

Article III, paragraph 2: " The industrial or commercial " profits of an Australian enterprise shall not be subject to " United Kingdom tax unless the enterprise is engaged in trade " or business in the United Kingdom through a permanent estab-" lishment situated therein. If it is so engaged, tax may be " imposed on those profits by the United Kingdom, but only on " so much of them as is attributable to that permanent estab-" lishment: Provided that nothing in this paragraph shall affect " any provisions of the law of the United Kingdom regarding " the imposition of excess profits tax and national defence contri-" bution in the case of inter-connected companies." Paragraph 3: " Where an enterprise of one of the territories is engaged in " trade or business in the other territory through a permanent "establishment situated therein, there shall be attributed to "that permanent establishment the industrial or commercial "profits which it might be expected to derive in that other "territory if it were an independent enterprise engaged in the "same or similar activities and its dealings with the enterprise "of which it is a permanent establishment were dealings at arm's "length with that enterprise or an independent enterprise; and "the profits so attributed shall be deemed to be income derived "from sources in that other territory . . ."

Before the commissioners the Crown put forward an argument which proceeded on the footing that the Relief Order was capable of applying to notional profits of a mutual assurance society, but for the reasons which are to be found set out in paragraph 5 of the case it was said that in fact the Relief Order did not affect tax under rule 3. That argument did not appeal to the commissioners, who decided the case in favour of the respondent society, and Mr. Pennycuick, for the Crown, has not felt able before me to challenge the correctness of their decision on that footing by any argument. So I have heard no argument at all on the case as presented to the commissioners, and therefore I do not propose to deal with their decision except to say that it was plainly reached after very careful and detailed reasoning, and on the footing stated I am content to accept their unchallenged reasoning and conclusion stated in paragraph 6 (5) of the case as my own.

Before me counsel for the Crown has raised a wholly new point, not suggested before the commissioners, which must now be briefly stated. He submits that the "industrial or commercial "profits" referred to in article II (1) (*i*) is incapable of referring to anything but real profits arising from an actual source of profit, whereas the respondent society, being a mutual society, has no actual profit nor any actual source of profit, and so the Relief Order does not apply to it. He says that the Relief Order is not dealing with purely notional or conventional profits which have no existence in law but have only a purely fictional existence for the purposes of rule 3.

It is submitted that "industrial or commercial profits" is defined in article II (1) (*i*), and therefore article II (3) has no application, whence it must follow that that phrase must be given its natural and ordinary meaning. That being so, it is said that the phrase cannot include purely notional or fictitious profits, but can only refer to real or actual profits, and there being none in law the Relief Order has no application.

Counsel for the Crown further submitted that article II is only dealing with profits taxable under Case I of Schedule D, and has no reference to notional profits taxed under Case III. But if it be accepted, as it must, in my judgment, in the light of the decision of the House of Lords, that tax under Case III is a tax on the profits of the business, I cannot see anything in the Relief Order which distinguishes between taxation under different Cases.

This is a difficult case. In the first place I do not think that " industrial or commercial profits " can really be said to be " otherwise defined " for the purposes of article II (3) by article II (1) (*i*). It is a curious definition, if it can be called such, which says " industrial or commercial profits " *includes* (omitting irrelevant words) profits from such business (i.e., business of life assurance) but does not include (inter alia) investment income. I do not think a clause so phrased (as so many Acts of Parliament now are) can properly be said to be a definition clause except in relation to those matters expressly stated to be included or expressly excluded. A large area not expressly defined is left. " Profits " is nowhere defined, and one is left in the dark as to whether deemed profits are within the inclusion; certainly in terms they are not excluded by the exclusion of investment income.

My approach to the Relief Order is that its whole object is to relieve from double taxation, and that therefore one is looking to those profits or surpluses which by the law of Australia or the United Kingdom (as the case may be) are made the subject of taxation. Article II (3) seems designed to that very end. It seems to me that when considering United Kingdom tax one must look to " profits " which are taxed by the United Kingdom, and if the United Kingdom taxation laws (as interpreted by the House of Lords) tax a trading surplus by deeming it to be a profit although in law it is not, so then that trading surplus is by article II (3) a profit within article II (1) (*i*).

In other words, if I may respectfully paraphrase the House of Lords' decision, rule 3 is taxing the trading surplus of the respondent society in this country by deeming that surplus to be profits. Those deemed profits are measured by a yardstick which, indeed, has but little relation to its actual trading surplus in this country, but nevertheless the actual yardstick, as I have already pointed out, matters not. However, the essential fact is that by statute the society is deemed to make taxable trading profits of its business. That seems to me to make the society's taxable surplus " profits " within the intendment of article II (3), and not to be excluded by any partial definition in article II (1) (*i*). I, therefore, reach the conclusion that these taxable surpluses of the respondent society are properly described as "industrial or commercial profits" for the purposes of the Relief Order.

When that conclusion is reached then the decision of the commissioners becomes dead in point, and, as I have already said, the consequence is not seriously challenged by Mr. Pennycuick. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Bell, Brodrick & Gray.*

K. R. A. H.

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May 21, 23.
Vaisey J.

ALLIANCE BUILDING SOCIETY *v.* PINWILL.

[1958 A. 245.]

Mortgage — Attornment clause — Notice to quit — Four weeks' notice required by statute to quit premises let as a dwelling—Whether applicable to mortgagor under attornment clause—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

Landlord and Tenant—Rent restriction—Notice to quit—Premises let as a dwelling—Statutory requirement of four weeks' notice—Whether applicable to mortgagor under attornment clause—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

A mortgage in the form of a legal charge contained an attornment clause under which the mortgagor attorned tenant to the mortgagee at a peppercorn rent. The clause also provided that at any time after the power of sale had become exercisable the mortgagee might determine the tenancy thereby created "after giving "to the borrower [the mortgagor] at least seven days' notice to "quit. . . ."

The mortgagor being in default the mortgagee gave the mortgagor 10 days' notice to quit the premises. On a summons asking for possession, the question was whether that notice was valid or whether the mortgagee was compelled to give four weeks' notice pursuant to section 16 of the Rent Act, 1957:—

Held, that section 16 protected a real tenant against a real landlord under a real "residential letting," and not a mortgagor against a mortgagee under such a mortgage deed as this; in the circumstances the correct notice was that required by the mortgage deed and not that required by section 16.

Ex parte Isherwood (1882) 22 Ch.D. 384; *Portman Building Society* v. *Young* [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951]

1 All E.R. 191 and *Steyning and Littlehampton Building Society* v. *Wilson* [1951] Ch. 1018; [1951] 2 T.L.R. 424; [1951] 2 All E.R. 452 applied.

ADJOURNED SUMMONS.

The mortgagees, the Alliance Building Society, claimed against the mortgagor, Edwin James Pinwill, delivery of possession of the mortgaged premises, which consisted of a dwelling-house, No. 390, Radleys, at Marston Green in the county of Warwick. The mortgage was in the form of a legal charge and dated November 1, 1950.

The only possible defence to the claim was whether the attornment clause contained in the mortgage brought the case within section 16 of the Rent Act, 1957.[1] The attornment clause, so far as material, was in the following terms: "(1) The borrower "hereby attorns tenant to the society of such part of the mort-"gaged property as now is or shall at any time during the "continuance of this security (but within twenty-one years from "the date of this charge) be in the occupation of the borrower "at the yearly rent of a peppercorn if demanded. (2) Provided "as follows:—(i) That the society may at any time after their "power of sale has become exercisable enter into and upon the "mortgaged property or any part thereof and determine the "tenancy hereby created after giving to the borrower at least "seven days' notice to quit. . . ."

It was assumed that the mortgaged property had at some time been in the occupation of the mortgagor, though that was not his address as given either in the mortgage itself, or in the notice to quit, or in the summons. It was, however, given as his address in a supplemental deed not otherwise relevant executed by him and dated July 8, 1952. At the present time it appeared that the property was occupied by his wife, who had been invited to attend these proceedings, but had not, in fact, done so.

The mortgagor being in default, the mortgagees, by a written notice dated January 7, 1958, gave him notice to quit the premises on January 17, 1958; that was a notice longer than the seven days required in the attornment clause. The question was whether this notice to quit was invalid as contravening section 16 of the Rent Act, 1957.

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[1] Rent Act, 1957, s. 16: "No "notice by a landlord or a tenant to "quit any premises let (whether "before or after the commencement "of this Act) as a dwelling shall be "valid unless it is given not less than "four weeks before the date on which "it is to take effect."

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John Mills for the mortgagees. The only question is whether the notice (which complies sufficiently with the terms of the attornment clause) is valid, or whether the four weeks' notice required by section 16 of the Rent Act, 1957, applies to this case.

There is no doubt that where an attornment clause contains terms as to notice, the mortgagee has to comply with those terms: *Hinckley and Country Building Society* v. *Henny.*[2] But the question here is whether section 16 on its proper construction applies. Section 16 only applies where there is a dwelling genuinely let as such by a genuine landlord to a genuine tenant. Under a mortgage containing an attornment clause the relationship of the parties is not that of landlord and tenant but of mortgagee and mortgagor: *Ex parte Isherwood* [3] and *Portman Building Society* v. *Young* [4]; see also *Steyning and Littlehampton Building Society* v. *Wilson* [5] and *Dudley and District Benefit Building Society* v. *Emerson.*[6]

The definition section of the Act of 1957, section 25, merely takes one back via the Housing Repairs and Rents Act, 1954, section 49, to the Rent Act, 1920. Contrast, however, section 69 of the Landlord and Tenant Act, 1954, where a tenancy arising under an attornment clause is expressly excluded. This case is, therefore, outside the ambit of section 16.

The mortgagor did not appear and was not represented.

Cur. adv. vult.

May 23. Vaisey J., having stated the facts, read the following judgment: The preamble to the Rent Act, 1957, states that one of its purposes was to provide a minimum length for notice to terminate "residential lettings." This clearly points to section 16.

The definition clause, section 25, is a remarkable instance of referential legislation, but does not seem to throw any light on the present question. This may be summarized as follows: Do I find in the attornment clause here either a "landlord" or a "tenant" or premises "let as a dwelling-house," within the meaning of section 16? In my judgment I find none of these things, and on the authorities to which I am about to refer I do not think that I can or should.

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[2] [1953] 1 W.L.R. 352; [1953] 1 All E.R. 515.

[3] (1882) 22 Ch.D. 384.

[4] [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951] 1 All E.R. 191.

[5] [1951] Ch. 1018; [1951] 2 T.L.R. 424; [1951] 2 All E.R. 452.

[6] [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

It is to be observed that in the Landlord and Tenant Act, 1954, the word " tenancy " is defined as not including " a mort- " gage term or any interest arising in favour of a mortgagor by " his attorning tenant to his mortgagee "; and the absence of any corresponding excepting provision from the Rent Act, 1957, may have some significance, but I confess that I do not know what it is. The draftsman of section 16 ought obviously to have provided for the point in one way or the other, and it is regrettable that with the precedent of the Act of 1954 to guide him he did not do so.

There is, in my judgment, much authority to support the view which I hold that section 16 is inapplicable, and first there is *Ex parte Isherwood*,[1] from which I will read a few words from the headnote as follows: " Notwithstanding the insertion of an " attornment clause in a mortgage deed, the real relation between " the parties is that, not of landlord and tenant, but of mortgagee " and mortgagor. . . ."

Then there is *Portman Building Society* v. *Young*,[2] in which it was held, in effect, that there was no relationship of landlord and tenant between the mortgagee and mortgagor, because the Rent Acts dealt only with cases [3] " in which the person in occupa- " tion was in the true sense a tenant of premises ' let ' to him " by " one " who was in ordinary language the landlord and " owner," and not " where the real relationship between the " parties was that of mortgagor and mortgagee."

In *Steyning and Littlehampton Building Society* v. *Wilson* [4] it was held that the Agricultural Holdings Act, 1948, could not have been intended to apply to anything other than true transactions between landlord and tenant, and did not apply to tenancies arising by reason of an attornment clause. The provision in section 23 (1) of that Act invalidated a notice to quit if it purported to terminate the tenancy before the expiration of 12 months from the end of the current year. It was held not to apply to a tenancy arising under an attornment clause, and I adopt the observation of Danckwerts J. at the beginning of his judgment where he says [5]: " This is a case, which again illus- " trates the undesirability of retaining in mortgages an attornment " clause, which is entirely obsolete and at the present time " performs no useful purpose."

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[1] (1882) 22 Ch.D. 384.

[2] [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951] 1 All E.R. 191.

[3] [1951] 1 All E.R. 191.

[4] [1951] Ch. 1018; [1951] 2 T.L.R. 424; [1951] 2 All E.R. 452.

[5] [1951] Ch. 1020.

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I am, in fact, of opinion that section 16 of the Rent Act, 1957, protects a real tenant against a real landlord under a real "residential letting" and is not intended to, and does not, benefit a mortgagor to the detriment of his mortgagee.

I should add that, although this decision may apply to many cases in which attornment clauses appear in mortgages, it does not necessarily apply to all of such cases; it might, for instance, be inapplicable to a case where the rent reserved was not a peppercorn but a full rack-rent, or to a case in which the terms of the mortgage obliged the mortgagor to reside personally on the premises.

I hold, therefore, that the mortgagees are entitled to the order which they seek in the present case. The length of notice required is seven days under the mortgage and not four weeks under section 16.

I may, in conclusion, refer to one other case, namely, *Hinckley and Country Building Society* v. *Henny*.[6]

Order accordingly.

Solicitors: *Boxall & Boxall for Cardens, Brighton.*

I. G. R. M.

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[6] [1953] 1 W.L.R. 352; [1953] 1 All E.R. 515.

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Jan. 13, 14, 15, 16;
Feb. 21;
Mar. 12.

Jenkins, Romer and Ormerod L.JJ.

INLAND REVENUE COMMISSIONERS *v.* WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION).
SAME *v.* BRANCEPETH COAL CO. LTD. (IN LIQUIDATION).
SAME *v.* RAMSHAW COAL CO. LTD. (IN LIQUIDATION).

Revenue—Income tax—Basis of assessment—Case VI—Whether payments assessable in respect of year in which received or year in respect of which they were paid—Meaning of "arising"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI, r.* 2.

Revenue—Income tax—Crown—Payments by—Whether Case III can apply—Crown immunity—Income Tax Act, 1918, *r.* 21, *of General Rules, Sch. D, Case III, r.* 1 (*a*).

Revenue—Income tax—"Annual payment"—Coal nationalization—Interim income payments—Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22—*Coal Industry* (*No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*), *Case VI, r.* 2.

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Revenue—Income tax—"Interest of money"—Statutory payment calculated as sum equal to interest on compensation to which it is added —Coal Industry Nationalization Act, 1946, *s.* 22 (2) (*a*)—*Income Tax Act*, 1918, *Sch. D, Case III, r.* 1 (*a*).

Mines and Minerals—Coal—Nationalization—Compensation—Interim income payments—Whether to be included in actual income of year of receipt or of year or period in respect of which it was paid—Coal Industry Nationalization Act, 1946, *s.* 5 (1).

The W. P. Coal Co. Ltd. carried on the trade of a colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalization Act, 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied, and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936. The company received from time to time payments from the Ministry of Fuel and Power of interim income under (1) section 22 (2) (*a*) of the Act of 1946, and (2) section 22 (3) thereof, and section 1 of the Coal Industry (No. 2) Act, 1949.

The company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51, and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

On the question whether, in computing the actual income of the company for the purpose of such apportionments, interim income should be included in the actual income of the year in which it was received (which it was conceded would be so if such payments were annual payments under Case III of Schedule D), or (as the company contended) of the year or period in respect of which it was paid:—

Held, (1) that interim income provided for by section 22 (2) (*a*) of the Act of 1946, though calculated as a sum equal to interest on the compensation to which it was added, was not interest thereon or "interest of money" within rule 1 (*a*) of Case III; nor was it an "annual payment" within the meaning thereof since it lacked the relevant quality of recurrence.

(2) That those payments made pursuant to section 22 (3) of the Act of 1946, and section 1 (2) of the Act of 1949, could properly be classed as annual payments within the meaning of rule 1 (*a*) of Case III.

Inland Revenue Commissioners v. *Butterley Co. Ltd.* [1957] A.C. 32; [1956] 2 All E.R. 197; 36 T.C. 411 considered.

But (3) that Case III of Schedule D was inapplicable since the payer of the annual sums in question was a Minister of the Crown, and the provisions relating to Case III in its application to annual payments were such as to preclude the construing of the word "person" in rule 21 of the General Rules, which was co-extensive with rule 1 (*a*) of Case III, as including the Crown.

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Madras Electric Supply Corporation Ltd. v. *Boarland* [1955] A.C. 667; [1955] 1 All E.R. 753; sub nom. *Boarland* v. *Madras Electric Supply Corporation Ltd.*, 35 T.C. 612; *Constantinesco* v. *Regem* (1927) 43 T.L.R. 727; 11 T.C. 730, 745 considered.

(4) That the whole of the interim income payments fell within Case VI of Schedule D; but that, since the word "arising" in rule 2 of the rules applicable to Case VI must be construed as meaning "received," the payments in question must nevertheless be treated as income of the years in which they were received.

Observations of Lord Hanworth M.R. in *Dewar* v. *Inland Revenue Commissioners* [1935] 2 K.B. 351, 366; 51 T.L.R. 536; 19 T.C. 561; and *Leigh* v. *Inland Revenue Commissioners* [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590 approved.

Dicta of Finlay J. in *Lambe* v. *Inland Revenue Commissioners* [1934] 1 K.B. 178, 186; 18 T.C. 212, 220 considered.

Per curiam. Whether the immunity of the Crown is founded upon construction, or on prerogative overriding construction, the result appears to be the same, namely, that the charging provisions of Taxing Acts do not extend to the Crown unless the Crown is included therein by express terms.

Decision of Harman J. affirmed in the result.

APPEALS from Harman J.

These were appeals by three former colliery companies. The Whitworth Park Coal Co. Ltd. appealed from an order of Harman J. made on July 31, 1957, allowing an appeal by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts who had allowed the company's appeal against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of those directions.

The Ramshaw Coal Co. Ltd. and the Brancepeth Coal Co. Ltd. each appealed from an order of Harman J. made on July 31, 1957, allowing an appeal by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts who had allowed (*a*) the Ramshaw Coal Co.'s appeal against a sub-apportionment, made for 1948–49 under section 32 of the Finance Act, 1927, among its members of an amount apportioned to it by an apportionment of the income of the Whitworth Park Coal Co. under section 21 of the Finance Act, 1922; and (*b*) the Brancepeth Coal Co.'s appeal against a sub-apportionment made for 1948–49 under section 32 of the Act of 1927 among its members of an amount apportioned to it by the sub-apportionment made on the Ramshaw Coal Co. In each case the question for determination was whether the actual income of the Whitworth Park Coal Co. was correctly computed for the purpose of the apportionment made on it and whether in consequence the amount which was the subject of the sub-apportionment was correctly computed.

Accordingly, the appeal of the Whitworth Park Coal Co. Ltd. alone was argued since the decision in that case governed the other two appeals. The following facts relating to the appeal of the Whitworth Park Coal Co. Ltd. are taken from the case stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 28, 1955, the company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

The sole question for determination was whether, in computing the actual income of the company for the purpose of the apportionments, interim income received by the company under the provisions of the Coal Industry Nationalization Act, 1946, and the Coal Industry (No. 2) Act, 1949, should be included in the actual income of the year in which it was received or (as the company contended) of the year or period in respect of which it was paid, it being (for the purpose of the hearing) conceded by the company that authorities binding on the commissioners would preclude them from holding that the sums received were of the nature of capital and should not be included in the company's actual income at all.

The company carried on the trade of colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Act of 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936.

The company received from time to time payments from the Ministry of Fuel and Power for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946 and (in the case of others of such payments) of that Act and of the Act of 1949. Those payments are set out in

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tabular form below, and were made under deduction of income tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of income tax . . .

Serial Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
(1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
(2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
(3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
(4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
(5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
(6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
(7)	November 11, 1950.	£7	£4	From July 1 to November 13, 1950.
(8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
(9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
(10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951.

The payments numbered 3, 6 and 7 in the above table were payments of the interest addition under section 22 (2) (*a*) of the Act of 1946 made on the occasions of payment under section 21 (1) (*b*) of the Act of 1946 of partial compensation for transferred assets.

The payments numbered 1 and 2 in the above table were made under section 22 (3) of the Act of 1946 after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under the provisions of regulation 20 of Statutory Rules & Orders, 1946 of 1947. The accompanying letters state: (in the case of payment No. 1) " It should be noted " that the gross amount allowed is an instalment subject to audit. " Any adjustment necessary will be made in a future payment," (and in the case of payment No. 2) " It should be noted that the " gross amount allowed is a provisional instalment subject to " audit of the statutory revenue payment. Any adjustments in " respect of over-payments or under-payments will be payable " forthwith to or by the Minister." An adjustment to the said two payments was made by deducting a sum of £1,394 in calculating the gross amount of payment No. 4. This deduction (referred to as an " Overpayment (provisonal) ") was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment No. 9, the accompanying letter to which states that the comparable ascertained revenue had been approved by the Minister.

Payments nos. 4, 5, 8 and 10 in the above table were made under the Act of 1949. In the case of 4, 5 and 8 the accompanying letters show that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each such letter states: "It should be noted that where the "amount now payable is based on provisional comparable ascer-"tained revenue, any necessary adjustment will be made later, "after the comparable ascertained revenue has been finally "approved by the Ministry." Payment no. 10 was based on the comparable ascertained revenue as approved by the Ministry.

The payments nos. 4, 5, 8 and 10 were each expressed to be subject to the provision contained in section 1 (5) of the Act of 1949 to the effect that if the said payments should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the company. The letter accompanying payment no. 5 (dated July 14, 1950, and in respect of the half-year to June 30, 1950) shows that in arriving at the gross sum of £1,616 a deduction was made in respect of interest at 3 per cent. per annum for the half-year in respect of compensation satisfied before June 30, 1950. A footnote to the letter states that "Any necessary adjustments as a result of S.I. 1950, No. "967, dated June 12, 1950, which prescribes an interest rate of "3 per cent. per annum for the period January 1, 1949, to June "30, 1949, and 3½ per cent. per annum for the period July 1, "1949, to June 30, 1950, will be made at a later date." Adjustments were duly made in computing payment no. 8.

The company's accounts were made up to March 31 in each year. In the accounts for the year ended March 31, 1948, there appears on the credit side of the revenue account the item "interim "income provision (gross) £6,050 0s. 0d." In the accounts for the year ended March 31, 1949, there is credited to the revenue account "Interim income" (net) £2,500 7s. 3d. In the accounts for the year ended March 31, 1950, there is credited to the revenue account "interim income (net) £37 4s. 11d." In the accounts for the year ended March 31, 1951, there is credited to the revenue account "interim income (net) £2,741 11s. 8d."

For the purposes of the apportionments under appeal, each of the payments set out above was treated as forming part of the actual income of the company of the year in which such payment was received by the company. The said payments made by the Ministry were not payable out of profits or gains brought into charge to income tax.

The commissioners held that the payments in question were chargeable to income tax under the provisions of Case VI of Schedule D to the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. They further held that the payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income (as agreed between the parties in accordance with their decision) of £5,422 14s. 0d., for 1948–49, £3,453 15s. 0d., for 1949–50 and £2,949 3s. 0d., for 1950–51.

Harman J. reversed the decision of the Special Commissioners, holding that the payments were chargeable to income tax under Case III, and from such reversal the company now appealed.

F. N. Bucher Q.C. and *Peter Rowland* for the company. Before January 1, 1947, the Whitworth Park Coal Co. Ltd. carried on the trade of a colliery proprietor, and since it was a company under the control of not more than five persons it was liable to directions for surtax purposes at the discretion of the Special Commissioners under section 21 of the Finance Act, 1922. On January 1, 1947, the assets of the company were compulsorily transferred to the National Coal Board by virtue of the provisions of the Coal Industry Nationalization Act, 1946. Thereafter the company ceased to trade and received compensation of an income nature for its transferred assets, and thereby it became an investment company for surtax purposes, and thereupon it was mandatory upon the assessing Special Commissioners to put into operation in respect of the company all machinery of direction and apportionment contained in section 21 of the Finance Act, 1922.

The company admits for present purposes, that the compensation payments are income for tax purposes and not capital, but it contends (contrary to the decision of Harman J.) that each amount received in respect of such interim income should be treated as accruing from day to day over the period in respect of which it was paid, and that the payments are taxable under Case VI and not Case III of Schedule D. The Crown's first contention is that these interim income payments are annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment, as provided by rule 21 of the General Rules, and that, accordingly, by virtue of section 39 (2) of the Finance Act, 1927, each such payment is to be deemed to be income of the year in which it is paid. It is not disputed that if Case III of Schedule D and rule 21 of the General Rules were applicable to the payments in question, the result would be as contended for by the Crown, but it is submitted they are not, for these payments lack the necessary element of recurrence to make them annual payments for the purposes of Case III. Accordingly, cases such as *Cunard's Trustees* v. *Inland Revenue Commissioners*[1] are distinguishable. As to the ambit of the phrase "annual payments," see *per* Lord Sterndale M.R. and Warrington L.J. in *Smith* v. *Smith*.[2] Further, to come within the scope of rule 1 (*a*) of Case III as an "other "annual payment," the payment in question must be ejusdem generis with the specific instances given in the rule, namely, interest on money and annuities: see *per* Hamilton J. in *Hill* v. *Gregory*[3] and *per* Scrutton L.J. in *Howe* (*Earl*) v. *Inland Revenue Commissioners*.[4] But in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[5] Lord Radcliffe described interim income payments under the Coal Acts, 1946 and 1949, as "sui generis," and therefore they cannot with consistency be described as ejusdem generis with any other payment, but must be treated as sui generis, and, accordingly, they fall within the sweeping provisions of Case VI. It is also to be observed that if it were enough to say that merely because a payment was annual, therefore it was an "annual payment" for the purposes of Case III, it would appear to apply to patent royalties. But the legislature found it necessary to make special provision in respect of patent royalties: see section 25 of the Finance Act, 1907.

In any event, even if the payments in question could properly be regarded as annual payments for the purposes of Case III, they are taken out of the provisions of that case by the circumstance that the payer was the Crown, that is, the Minister of Fuel and Power. Rules 19 and 21 of the General Rules are concerned with annual payments in which there is a transfer of income from one taxpayer to another. Those provisions are quite inappropriate to a situation where a Minister of the Crown is authorized by statute to make certain payments, since the sums in question are never *income* in the hands of the Minister. Further, the payer is entitled to deduct the tax payable on such sums, and it is plain from section 24 (3) of the Customs and

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[1] [1946] 1 All E.R. 159; 27 T.C. 122.

[2] [1923] P. 191, 197, 202.

[3] [1912] 2 K.B. 61, 70.

[4] [1919] 2 K.B. 336, 352, 353.

[5] [1957] A.C. 32, 58.

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Inland Revenue Act, 1888, that it is only a *taxpayer* who has to account to the Revenue for the amounts so deducted. Accordingly, since the Income Tax Act, 1918, is a consolidating statute, it should be so construed as not to alter the existing law. It follows that the Act of 1918 cannot be said to have contemplated that a Minister of the Crown should have to account for tax deducted to the Crown, which, on the face of it, would seem to be an absurdity.

Case VI has a very wide ambit: see *Forth Conservancy Board* v. *Inland Revenue Commissioners*.[6] The proper method of assessing these payments would be to attribute to each year only such proportion of any payment in respect of interim income as would be appropriate on the basis that the amount of such payment is income of the period in respect of which it was paid, and accrued from day to day during that period. [Reference was also made to *Humber Conservancy Board* v. *Bater*[7] and *Curtis Brown Ltd.* v. *Jarvis*.[8]]

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown. (1) The payments made to this company under the Coal Acts, 1946 and 1949, are chargeable under Case III of Schedule D. (2) In the alternative, these payments are chargeable under Case VI of Schedule D. On that footing, equally, the payments form part of the income of the company in the year of receipt and cannot be related back.

With regard to (1) (supra), the first question is whether these payments under the Coal Acts, 1946 and 1949, represent "other "annual payments" under sub-paragraph (*a*) of rule 1 applicable to Case III. It is submitted that on the language of the rule and a number of authorities the qualifications which characterize the genus under rule 1 (*a*) are these three and these three only: (i) the payments must be payable under a legal obligation; (ii) the payments must be capable of recurrence; (iii) the payments must represent pure income profit in the hands of the recipient. A series of annual payments must possess the above characteristics to fall under rule 1 (*a*).

As to (i), no question arises under this head. It excludes voluntary allowances. As to (ii), see *per* Lord Maugham in *Moss' Empires Ltd.* v. *Inland Revenue Commissioners*[9] that a payment to be "'annual' must . . . have . . . the quality of being "recurrent or being capable of recurrence." See also *Smith* v.

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[6] [1931] A.C. 540.

[7] [1914] 3 K.B. 449.

[8] (1929) 14 T.C. 744.

[9] [1937] A.C. 785, 795.

Smith[10] and *Inland Revenue Commissioners* v. *City of London* (*as Conservators of Epping Forest*).[11] As to (iii), see *Howe* (*Earl*) v. *Inland Revenue Commissioners*,[12] which is indicative in a negative way of the nature of annual profits for the purposes of rules 19 and 21 and Case III. The criterion is: is the payment an element in the ascertainment of the profit or is it pure profit taken by itself. If the former, it is not a pure income profit under Case III and it is not collected by deduction as provided under rules 19 and 21 of the General Rules. If the latter, it is: *In re Hanbury*,[13] *per* Lord Greene M.R.

Revenue payments made pursuant to section 19 (2) and calculated in accordance with section 22 (3) of the Act of 1946 are capable of recurrence, and since also they have the other characteristics of annual payments they are " annual payments " within Case III. The interim income payable pursuant to section 19 (2) and calculated in accordance with section 22 (3) of the Act of 1946 is exactly comparable to interest paid on a sum awarded under a court judgment, and accordingly is " interest " within the meaning of Case III: see *Riches* v. *Westminster Bank Ltd.*[14] The payments in question possess all the characteristics necessary to bring them within the head of " interest on money " . . . or other annual payment " contained in rule 1 (*a*) of Case III of Schedule D, since (i) the taxpayer company has a legal right to receive these payments; (ii) the payments possess the necessary quality of being capable of recurrence; (iii) the payments represent pure income profits in the hands of the company and are akin to ordinary interest and dividends and they do not represent the receipts of any trade carried on by the company.

The following objections are put forward by the company in support of the contention that in the circumstances these payments are taken out of Case III:

(a) It is said that in order to quantify and recover these payments the company has had to incur expenses in paying its agents in respect thereof. This is an irrelevant consideration; it cannot affect the quality of the payments as pure income profit. [Reference was made to *Inland Revenue Commissioners* v. *National Book League*.[15]]

(b) It is contended that the amount and date of the payments depends on the will of the payer, the Minister. This in no way affects the quality of these payments as "annual payments" under Case III. It is an element which is frequently found in discretionary trusts. In *Cunard's Trustees* v. *Inland Revenue Commissioners*[16] the Court of Appeal held that payments out of capital (a fortiori income) made from time to time under a discretionary power conferred on trustees fell within rule 1 (*a*) of Case III.

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[10] [1923] P. 191, 201.
[11] [1953] 1 W.L.R. 652.
[12] [1919] 2 K.B. 336, 352.
[13] (1939) 2 A.T.C. 333, 334.
[14] [1947] A.C. 390.
[15] [1957] Ch. 488.

(c) There is a liability on the company for adjustment in respect of any overpayments. This circumstance cannot affect the quality of a payment which falls to be made either under the Act of 1946 or the Act of 1949. In *Williamson* v. *Ough*[17] it was held by the House of Lords that the mere fact that the corpus of a fund was recoupable out of future income did not prevent rule 21 of the General Rules from being applicable. The fact that there may have to be an adjustment cannot affect the taxable character of what is otherwise an annual payment. The argument for the company on this point is of far-reaching importance, since it would follow therefrom that rules 19 and 21 applicable to Case III would be excluded in any case where, although there was an annual payment, there was the slightest possibility that some of such payments might have to be repaid in the future. [Reference was made to *Stewart's Executors* v. *Inland Revenue Commissioners*.[18]]

(d) For rule 21 of the General Rules and Case III to apply it is necessary that the payer of the annual sum in question should be a person capable of earning a profit, and the Minister is not a person capable of earning a profit for the purposes of the Income Tax Acts. It is submitted that the legal nature of the deduction in the present case is that the Minister pays on behalf of the company the tax attributable to these payments made under the Acts of 1946 and 1949. There is nothing in the language of rule 21 as it now stands which makes it inapplicable to a Government Department making such a payment. The language of rule 1 (*c*) and (*d*) of the rules applicable to Case III displaces the contention that rule 21 of the General Rules is inapplicable to a Minister of the Crown in these circumstances. This question is of very great general importance. It was raised in argument as a new point in the House of Lords in *Constantinesco* v. *Regem*,[19] but the House declined to give a decision on it since it had not been argued in the courts below. It is submitted that in the light of the subsequent decision of the House of Lords in *Madras Electric Supply Corporation* v. *Boarland* [20] the test to be applied is whether or not on the language of any particular provision in the Income Tax Acts the Crown is expressly excluded from its operation. It is a question of construction whether or not the word "person" in the rule includes the Crown. There is nothing in rule 21 of the General Rules which can prejudice the Crown; on the other hand, it confers considerable benefits on the Crown because it is enabled thereby to deduct tax before payment instead of paying the sum in full and then making a demand for the tax thereon. The penalty provisions of paragraph (2A) of the rule are not prejudicial, for in the most unlikely event of the penalty being demanded the effect would be the transference of a sum of money by way of fine from one department of the Crown to another. [Reference was made to *In re Green*.[21]]

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[16] [1946] 1 All E.R. 159.

[17] [1936] A.C. 384.

[18] (1952) 33 T.C. 184.

[19] (1927) 43 T.L.R. 727.

With regard to the alternative point (2) (supra), even if the payments come within Case VI of Schedule D they form part of the income of the years in which they were received. Rule 2 of the rules applicable to Case VI provides that the computation of the tax payable shall be made in the year of assessment. What the company is seeking to do is this: in respect, for example, of the year 1947, it is entitled to a payment under the Act of 1946. It contends that it is assessable for the first time in respect of such payment at the moment when the company actually receives it, but that it is then liable to be assessed for that payment not for the year of receipt but in respect of the year for which payment was made. Thus, suppose a payment in respect of the calendar year 1947 had not been received until the calendar year 1950, the company contends that it is not liable to assessment until the actual time of receipt, for example, May 1, 1950. But having received the payment on that date the company say that it is not assessable for the year 1950–51, but for the years 1946–47, 1947–48, these being the fiscal years for the calendar year 1947. It is submitted that that is wrong. The general principle by which income tax is charged is that each year is treated as a separate year; in calculating the profits of a particular year in which tax is to be charged, the general rule is to ascertain the income of that year, and that is what is received in that year. To that general principle there are certain qualifications, the most important of which is that in the case of a trader the profits of a particular tax year are treated as being the

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[20] [1955] A.C. 667.

[21] [1904] W.N. 105.

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balance of profit as earned by the taxpayer in the previous tax year. Apart from the exceptional cases which only arise in making up a trader's fiscal account, there are no cases where a profit (that is, income) is received by a taxpayer, and payment is put back into a previous fiscal year and charged to tax in respect of that year.

Accordingly, these payments when received should be treated as income of the year of receipt: see the decision of Rowlatt J. in *Grey* v. *Tiley*.[22] [Reference was also made to *Dewar* v. *Inland Revenue Commissioners*.[23]]

Bucher Q.C. in reply. (1) The Crown's definition of the genus as income brings everything within rule 1 (*a*) applicable to Case III and leaves nothing for Case VI. These payments do not come within rule 1 (*a*), because they lack both the hallmark of an annuity and of interest. For a payment to come within rule 1 (*a*) it must be (i) income from property; (ii) the transferring of a share of one taxpayer's income to another taxpayer; (iii) it must be income from a source. These payments are not "income from investments"; they are not "income from any "property"; they are not "income from any source": see *per* Evershed M.R. and Jenkins L.J. in the Court of Appeal and *per* Lord Radcliffe in the House of Lords in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[24] Further, the words "annual payment" in rule 21 (1) of the General Rules have a clearly limited meaning; a payment to come within the rule must be akin to an annuity or interest, and it must be payable by a taxpayer or some person capable of being a taxpayer, and that does not include the Crown in the present case, because there is no necessary implication or express provision of law to make the Crown amenable to rule 21. Therefore, even though these payments possess the three characteristics propounded by the Crown of being payable under a legal obligation, capable of recurrence, and being a pure income profit in the hands of the recipient, they are still not "annual payments" within the strict meaning of those words in rule 21.

(2) The general principle of income tax in relation to Case VI is that income is to be taxed in the year of entitlement. There are two exceptions to that principle, (a) where the system of deduction of tax by the paying agent has been brought in, for example, Schedule C; (b) certain foreign income where relief is granted to the taxpayer on what is received by him in the United

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[22] (1932) 16 T.C. 414.

[23] [1935] 2 K.B. 356, 357, 366, 372.

[24] [1955] Ch. 453, 468, 469, 485, 486; [1957] A.C. 32, 58, 60–62.

Kingdom—"the remittance basis." When a payment is received an assessment should then be made in respect of that payment but it should be related back to the year when the entitlement arose.

[Reference was also made to sections 29 (2), 30 and 35 of the Finance Act, 1926; sections 28 and 39 of the Finance Act, 1927; section 23 (3) of the Finance Act, 1938; sections 10 and 23 of the Transport Act, 1947; sections 11 and 28 of the Electricity Act, 1947; regulations 14 (1), 16 (1), 17, 19 and 20 of the Coal Industry Nationalization (Satisfaction of Compensation) Regulations, 1947 (1947 S.I. 1946); *Coomber* v. *Justices of the County of Berks* [25]; *Champney's Executors* v. *Inland Revenue Commissioners* [26]; *Leigh* v. *Inland Revenue Commissioners* [27]; *In re Sebright* [28]; *Ryall* v. *Hoare*; *Ryall* v. *Honeywill* [29]; *Grey* v. *Tiley* [30]; *Inland Revenue Commissioners* v. *Hawley* [31]; *Simpson* v. *Maurice's Executors* [32]; *Isaac Holden & Sons Ltd.* v. *Inland Revenue Commissioners* [33]; *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners* [34]; *Lambe* v. *Inland Revenue Commissioners*.[35]]

Pennycuick Q.C., in reply on the Case VI aspect of the appeal, referred to *Johnson* v. *W. S. Try Ltd.*[36] and *Brocklesby* v. *Merricks*.[37]

Cur. adv. vult.

February 21. JENKINS L.J. read the following judgment of the court: The first of these three appeals is brought by the Whitworth Park Coal Co. Ltd. from a judgment of Harman J., dated July 31, 1957, whereby (reversing the determination of the Special Commissioners) he decided in favour of the Crown a question concerning the computation of the actual income of the company for the years 1948–49, 1949–50 and 1950–51, for the purposes of directions and consequential apportionments of the actual income of the company amongst its members given and made with respect to the company under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939.

Down to December 31, 1946, the company, which was under the control of not more than five persons, and consequently a company to which the provisions of section 21 of the Finance Act, 1922, applied, carried on the business of a colliery proprietor. So long as the company continued to trade, the position, to put it very shortly, was that the giving of directions and making of consequential apportionments with respect to the company under section 21 depended upon the discretion of the assessing Special Commissioners, such discretion being exercised in the event of it appearing to them that the company had not distributed a reasonable part of its actual income so as to make the amount distributed income of its members for surtax purposes.

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[25] (1883) 9 App.Cas. 61, 76.
[26] (1934) 19 T.C. 375.
[27] [1928] 1 K.B. 73.
[28] [1944] Ch. 287.
[29] [1923] 2 K.B. 447, 454, 455.
[30] 16 T.C. 414, 421.
[31] [1928] 1 K.B. 578.
[32] (1929) 45 T.L.R. 581.
[33] (1924) 12 T.C. 768.
[34] (1927) 43 T.L.R. 476.
[35] [1934] 1 K.B. 178.
[36] (1946) 27 T.C. 167, 181.
[37] (1934) 18 T.C. 576.

By virtue of the provisions of the Coal Industry Nationalization Act, 1946 (which we will for brevity term " the Coal Act of " 1946 "), the colliery assets of the company were on January 1, 1947 (the " primary vesting date," fixed pursuant to section 5 of the Act) compulsorily transferred to the National Coal Board, and the company became entitled in respect of the assets so transferred to compensation, which became due on the same date subject to the determination of the amount thereof, and also to " interim income " for the period between that date and the date on which such compensation should be fully satisfied.

The company accordingly became as from the primary vesting date an investment company within the meaning of section 20 (1) of the Finance Act, 1936, because it had ceased to trade and no longer had any income other than the " interim income " to which it was entitled under the Coal Act of 1946 (with certain modifications later introduced by the Coal Industry (No. 2) Act, 1949, hereinafter referred to as " the Coal Act of 1949 "), and which would not, if the company had been an individual, have been earned income as defined in section 14 (3) of the Income Tax Act, 1918. Accordingly, by virtue of section 14 of the Finance Act, 1939 (to put it very shortly), the whole of the actual income of the company was to be deemed to be the income of its members irrespective of the amounts of any distributions made, and the assessing Special Commissioners were enjoined to put into operation with respect to the company all machinery of direction and apportionment contained in section 21 of the Finance Act, 1922.

There is no dispute as to the applicability of section 21 of the Finance Act, 1922, and section 14 of the Finance Act, 1939. It is, moreover, accepted by the company that the " interim " income " to which it was entitled under the nationalization legislation was for tax purposes income and not capital. But the assessing Special Commissioners, in making their apportionments for the three years under appeal, treated each sum received by the company in respect of interim income as income of the company for the year in which it was actually so received, and Harman J. has held that they were right in so doing. The company contends that this method of computation was wrong and claims that (as held by the Special Commissioners who tried the case) each amount received in respect of interim income should be treated as accruing from day to day over the period in respect of which it was paid, and that the proportion of any such amount attributable to each of the three years under appeal should be ascertained on that footing.

That is the sole question in the appeal. The competing contentions in regard to it are these:

A. For the Commissioners of Inland Revenue it is said: (i) That the payments made in respect of interim income were annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D in the Income Tax Act, 1918, and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment, as provided by rule 21 of the General Rules in that Act, with the result that by virtue of section 39 (2) of the Finance Act, 1927, each such payment was to be deemed to be income of the year in which it was paid; and (ii) that even if (contrary to their first contention) Case III of Schedule D is inapplicable and recourse must be had to the sweeping provisions of Case VI, the same result follows, that is to say, each payment in respect of interim income must be treated as income of the year in which it was paid.

B. For the company it is said: (i) That while the result of applying Case III of Schedule D and rule 21 of the General Rules would be as claimed by the Commissioners of Inland Revenue, those provisions are not applicable to the payments here in question because (a) their character was not such as to make them annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules; and (b) that even if they could in other respects properly be regarded as annual payments within the meaning of those provisions, the application to them of those provisions is excluded by the circumstance that the payer was the Crown as represented by the Minister of Fuel and Power; and (ii) that the appropriate head of charge was Case VI of Schedule D, and that proper assessments under that head would attribute to each year only such proportion of any payment in respect of interim income as would be appropriate on the footing that the amount of such payment was income of the period in respect of which it was paid, and accrued from day to day during that period.

In order to do justice to these contentions it is necessary to refer to the provisions of the Coal Act, 1946, and also to those of the Coal Act, 1949, relating to the right to interim income and the ways in which that right was to be satisfied.

By section 5 (1) of the Coal Act, 1946, the assets compulsorily acquired were to vest in the board on such date as the Minister (i.e., the Minister of Fuel and Power) should by order appoint. That date (as we have already mentioned) was fixed by the Minister as January 1, 1947.

By section 19 of the said Act: " (1) Compensation in respect " of a transfer of transferred interests or of an overhead expenses " increase shall be due on the primary vesting date, subject to " determination of the amount thereof. (2) For the period " between the primary vesting date and the date on which any " such compensation is fully satisfied, there shall be a right to " interim income, to be satisfied in accordance with the provisions " of section twenty-two of this Act." Then (3): " Provision may " be made by regulations for authorizing the partial satisfaction " of such compensation before the determination of the amount " thereof has been completed."

By section 21 of the same Act compensation in respect of the assets transferred was to be satisfied by the issue of Government Stock, with certain exceptions (the only one applicable here being, we think, the value attributable to stocks of colliery products and consumable or spare stores) where it was to be satisfied by a money payment.

By section 22 of the same Act, subsection (1): " The right " conferred by subsection (2) of section nineteen of this Act to " interim income for the period between the primary vesting date " and the date of the satisfaction in full of compensation in " respect of a transfer of transferred interests, or of an overhead " expenses increase, shall be satisfied in accordance with the " provisions of this section." Then subsection (2): " Subject to " the provisions of subsections (3) and (4) of this section as to the " revenue payments therein mentioned,—(*a*) the said right " conferred by subsection (2) of section nineteen of this Act shall " be satisfied, so far as regards interim income for the period " between the primary vesting date and the time when any " amount of compensation in respect of a transfer of transferred " interests or of an overhead expenses increase is satisfied, by " making, in addition to the issue of the stock then issued in "satisfaction of that amount of compensation or to the making "of the money payment then made in satisfaction of that amount "of compensation, as the case may be, a money payment of an "amount equal to interest for that period on that amount of "compensation at such rate or rates as may be prescribed as "respects that period or different parts thereof by order of the "Treasury. . . ." Subsection (3): "The following provisions of "this subsection shall have effect as to the making to colliery con- "cerns, and to subsidiaries within the meaning of the First "Schedule to this Act of such concerns, of payments in respect "of each of the two years beginning with the primary vesting "date and the first anniversary thereof respectively, that is to "say,—(*a*) a colliery concern or such a subsidiary shall be entitled "in respect of each of the said two years to a payment of an "amount equal to one half of the comparable ascertained revenue "of the concern, or of the subsidiary, as the case may be, "attributable to activities thereof for which the transferred "interests thereof were used or owned; (*b*) the payments to be "made under the last preceding paragraph are in this section "referred to as 'revenue payments,' and shall be money pay- "ments." Then sub-paragraph (*c*) provides a method of computing comparable ascertained revenue by reference to one of two alternative periods to be selected, to put it shortly, by the company concerned. Subsection (4) provides: "The provision made "by the last preceding subsection shall be deemed, in the case "of any colliery concern or of any such subsidiary, to be in "substitution for the provisions of subsection (2) of this section, "so far as regards additions thereunder for the said two years "or any part thereof to compensation for a transfer of trans- "ferred interests being compensation attributable to transferred "interests of that concern or subsidiary, except as to any excess "of the aggregate amount of such additions over the aggregate "amount of the revenue payments of that concern or subsidiary." And by subsection (5): "The Minister may by regulations make "such provision supplementary to or consequential on the "provisions of this section as appears to him to be necessary "or expedient, and in particular, but without prejudice to the "generality of this subsection, provision may be made by regula- "tions made thereunder for making adjustments requisite for "giving effect to the last preceding subsection and for making "good any underpayment or overpayment to a colliery concern "or such a subsidiary which may occur in consequence of the "making of additions or revenue payments under this section "before all the facts relevant for giving effect to the last preceding "subsection have become ascertainable."

We can now pass to section 1 of the Coal Act, 1949. Subsection (1) of that Act provides: "The following provisions of "this section shall have effect with respect to the making to "colliery concerns, and to subsidiaries of such concerns, of payments in respect of the year nineteen hundred and forty-nine "and subsequent years towards satisfaction of the right to interim "income conferred by subsection (2) of section nineteen of the "Coal Industry Nationalization Act, 1946 (hereinafter referred to "as 'the principal Act'). (2) A colliery concern or a subsidiary "of a colliery concern shall, in respect of the year nineteen "hundred and forty-nine and in respect of any subsequent year "before that in which compensation under the principal Act in "respect of the transfer of the transferred interests of the concern "or subsidiary is satisfied in full, be entitled to a payment of an "amount equal to the amount by which one third of the comparable ascertained revenue of the concern, or of the subsidiary, "as the case may be, attributable to activities thereof for which "the transferred interests thereof were used or owned exceeds an "amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of "that year." There follows a provision about the rate of interest, and there is reference to provisions about that in the Act of 1946 to which I have already referred. By subsection (3): "A payment to which a colliery concern or a subsidiary of a colliery "concern is entitled under the last foregoing subsection in respect "of any year shall be treated for the purposes of paragraph (*a*) "of subsection (2) of section twenty-two of the principal Act "as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money "payments made after the expiration of that year in satisfaction "of compensation in respect of transfers of transferred interests "of the concern or subsidiary." Then subsection (5) gives the Minister power to make regulations "making such provision "supplementary to or consequential on the foregoing provisions "of this section as appears to him to be requisite or expedient, "and in particular, but without prejudice to the generality of this "subsection, provision may be made by regulations made thereunder for requiring the repayment to the Minister of any "amount by which a payment made under this section in respect

" of any year to a colliery concern or subsidiary may exceed the " aggregate towards satisfaction of which that payment is under " subsection (3) of this section to be treated as being made, and " as to the manner of recovery of that amount and the disposal of sums recovered in or towards satisfaction of repayment " thereof: Provided that in a case where provision is made for " recovering the excess or any part thereof by way of deduction " from compensation in respect of transfers of transferred " interests of the concern or subsidiary, provision shall be made " for setting off against the deduction the aggregate of—(*a*) an " amount which bears to the amount of the deduction the same " proportion that the amount of income tax ultimately borne " by the concern or subsidiary for the income tax year the beginning of which falls within the year in respect of which the excess " arises bears to the amount which its total income for income " tax purposes for that income tax year would be if it were computed without regard to any relief or deduction in respect of " profits tax; and (*b*) an amount which bears to the amount of the " deduction the same proportion that the amount of profits tax " ultimately borne by the concern or subsidiary (as determined " in accordance with rules laid down by the regulations) in respect " of the aggregate (as so determined) of its profits which are " attributable to the year in respect of which the excess arises " bears to that aggregate." By subsection (6): " Nothing in the " last foregoing subsection or in regulations made thereunder shall " be construed as implying that a payment made under this " section to a colliery concern or subsidiary, or a part of any " such payment, is for any purpose anything but a payment of " income to the concern or subsidiary, or as precluding the distribution as income of a payment so made."

It will be seen that these provisions prescribe three methods of satisfying the right to interim income, viz.:

(i) Under section 22 (2) (*a*) of the Coal Act, 1946, by making in respect of the period from primary vesting date to the time of payment or satisfaction of any compensation, in addition to the compensation then paid or satisfied, a money payment of an amount equal to interest for that period on that amount of compensation at the rate or rates prescribed by the Treasury;

(ii) Under section 22 (3) of the same Act, in respect of each of the calendar years 1947 and 1948, by a revenue payment equal to one half of the comparable ascertained revenue of the concern attributable to the activities thereof for which the transferred interests thereof were used or owned, this mode of providing for

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interim income being by subsection (4) in substitution for the provisions of subsection (2) so far as regards additions thereunder for those two years in respect of like subjects of compensation, except as to the excess of the aggregate amount of such additions over the aggregate amounts of the revenue payments made in the same case; and

(iii) Under section 1 (2) of the Coal Act of 1949, in respect of the year 1949 and subsequent years, by making, in respect of each year down to the year in which the relevant compensation was satisfied in full, a modified form of revenue payment consisting of an amount equal to the excess of one-third of the comparable ascertained revenue over an amount equal to interest for the year in question (at the rate or rates referred to in section 22 (2) (*a*) of the Coal Act, of 1946) on the aggregate amount of that compensation satisfied before the end of that year, payments under section 1 (2) of the Coal Act of 1949 in respect of any year being treated (by subsection (3) of the same section) as made towards satisfaction of the proportions attributable to that year of the additions in respect of interim income falling to be made under section 22 (2) (*a*) of the Coal Act, 1946, to compensation paid or satisfied after the end of that year, with power for the Minister under section 1 (5) of the Coal Act of 1949 to provide by statutory instrument (inter alia) for the repayment to him of any amount whereby a payment under that section exceeded the aggregate towards satisfaction of which such payment was under subsection (3) to be treated as being made.

The right to interim income and the three methods of satisfying it under the Coal Mines Acts of 1946 and 1949 being as above described, the first matter for consideration is whether payments made towards satisfaction of such right in the three ways prescribed or any of them were of such a nature that (apart from the fact that the payer was a Minister of the Crown) they can properly be classed as annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D.

The income tax provisions directly relevant to this point appear to be:

(i) Paragraph 1 of Schedule D in the Income Tax Act, 1918, which provides that: "Tax under this Schedule shall be charged "in respect of . . . (*b*) All interest of money, annuities, and other "annual profits or gains not charged under Schedule A, B, C or "E, and not specially exempted from tax;"

(ii) Paragraph 2 of the same Schedule which provides that: "Tax under this Schedule shall be charged under the following

" cases respectively; that is to say, . . . Case III Tax in respect of " profits of an uncertain value and of other income described in " the rules applicable to this Case; . . . and subject to and in " accordance with the rules applicable to the said Cases respec- " tively."

(iii) Rule 1 of the rules applicable to Case III of Schedule D which provides that: " The tax shall extend to—(*a*) any interest of " money, whether yearly or otherwise, or any annuity, or other " annual payment, whether such payment is payable within or " out of the United Kingdom, either as a charge on any property " of the person paying the same by virtue of any deed or will or " otherwise, or as a reservation thereout, or as a personal debt or " obligation by virtue of any contract, or whether the same is " received and payable half-yearly or at any shorter or more " distant periods."

(iv) The Miscellaneous Rules applicable to Schedule D which provides that: " Tax under this Schedule shall be charged on and " paid by the persons or bodies of persons receiving or entitled to " the income in respect of which tax under this Schedule is " hereinbefore directed to be charged."

(v) Rule 21 (1) of the General Rules, which provides that: " Upon payment of any interest of money, annuity, or other " annual payment charged with tax under Schedule D, or of any " royalty or other sum paid in respect of the user of a patent, not " payable, or not wholly payable out of profits or gains brought " into charge, the person by or through whom any such payment " is made shall deduct thereout a sum representing the amount " of the tax thereon at the rate of tax in force at the time of " the payment."

Reference should also be made to paragraph 6 of the First Schedule to the Finance Act, 1922, which provides that in computing the actual income from all sources of a company for any year or period for the purposes of section 21 of that Act: " The income " from any source shall be estimated in accordance with the " provisions of the Income Tax Acts relating to the computation " of income from that source; except that the income shall be " computed by reference to the income for such year or period as " aforesaid and not according to an average of more than one year " or by reference to any year or period other than such year or " period as aforesaid."

So far as we are aware, there has been no reported case concerning the assessment to income tax of interim income under the Coal Acts, 1946 and 1949, but the relevant provisions of those enactments have been the subject of close consideration in this court and the House of Lords in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[1] in relation to profits tax.

The effect of that decision will be sufficiently indicated by the following citation from the headnote of the report[2]: " *Held*, that " these sums were not to be included in the computation of the " company's profits for the purposes of assessment to profits tax. " To bring a payment within the scope of profits tax as ' profits " ' arising in each accounting period from any trade or business ' " it was not enough that it should be income derived from the " property of the company without regard to the question whether " it arose from a trade or business carried on by the company " during the relevant period. The payments, though income, " were not ' income received from investments or other property ' " within the meaning of Schedule IV, paragraph 7, to the Finance " Act, 1937. Neither was the capital asset (viz., the right to " receive compensation) an asset so related to any trade or business carried on by the company that it fell within paragraph 7, " nor (if it were) were the payments in question ' income ' of that " asset."

Mr. Bucher, for the company, cited a number of passages from the judgments and speeches in this court and the House of Lords in the *Butterley Co.'s* case.[2] It will suffice to refer to the following observations from the speech of Lord Radcliffe[3]: " In " my opinion, the determining factor is the very special nature " of the receipts involved. The Coal Industry Nationalization " Act, 1946, legislated for a revolution in the coal industry of this " country and in the system of ownership, management and " working upon which the industry was based. It was inevitable " that the far-reaching disturbance of rights which this involved " should require a period of several years for the adjustment of " its consequences. These interim income payments which are " now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they " cannot well be related to any of those other kinds of receipt " which normally come into the accounts of a company conducting a trade or business. They are sui generis and it would, " I think, lead to confusion if they were described in any terms " except those which are strictly applicable to their own special " circumstances." Lord Radcliffe also said[4]: " I said before

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[1] [1957] A.C. 32; [1956] 2 All E.R. 197; 36 T.C. 411, H.L.

[2] [1957] A.C. 32.

[3] Ibid. 57.

[4] Ibid. 62.

" that I regard these payments as sui generis. The main feature " of them which impresses me is that they were not income which " arose from any disposable source under the respondents' " control."

There have been many judicial pronouncements as to the scope of rule 1 (*a*) of Case III and the following propositions can be regarded as established:

(1) To come within the rule as an " other annual payment " the payment in question must be ejusdem generis with the specific instances given in the shape of interest of money and annuities: see *Hill* v. *Gregory*,[5] *per* Hamilton J. and *Howe* (*Earl*) v. *Inland Revenue Commissioners*,[6] *per* Scrutton L.J. Mr. Bucher submitted that this requirement could not well be fulfilled by the interim income here in question consistently with Lord Radcliffe's description of it in the *Butterley Co.'s* case[7] as " sui generis." He said in effect that if interim income under the Coal Acts, 1946 and 1949, was in truth " sui generis " it could not be " ejusdem generis " with any other form of payment, and that the natural home of " sui generis " income was Case VI of Schedule D. We can attach no great weight to this line of argument, for Lord Radcliffe was, as we think, directing himself to the peculiarity of interim income as income not arising from any trade or business or from any contractual obligation or from any income-bearing asset, but payable simply because (as he put it [8]) " the nationalization statute decreed that " it " should be paid." The fact that it is " sui generis " in these respects does not appear to us to preclude its inclusion in rule 1 (*a*) of Case III if it possesses the essential characteristics on which the application of the rule depends, which are in effect those appearing from the further propositions stated below.

(2) The payment in question must fall to be made under some binding legal obligation as distinct from being a mere voluntary payment: see *Smith* v. *Smith*,[9] *per* Lord Sterndale M.R. and Warrington L.J. That requirement is clearly satisfied in the present case.

(3) The fact that the obligation to pay is imposed by an order of the court and does not arise by virtue of a contract does not exclude the payment from rule 1 (*a*) of Case III. " The words in " Case III 1 (*a*), ' whether such payment ' and so forth do not in

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[5] [1912] 2 K.B. 61, 70, 71; 6 T.C. 39, 47.

[6] [1919] 2 K.B. 336, 352, 353; 35 T.L.R. 461; 7 T.C. 289.

[7] [1957] A.C. 32.

[8] Ibid. 58.

[9] [1923] P. 191, 197, 202; 39 T.L.R. 632.

"my opinion limit the annual payments to those there mentioned, "but merely provide that they at all events shall be included." See Warrington L.J. in *Smith* v. *Smith*[10] and Lord Sterndale M.R. to the same effect.[11] We should add a reference to *Inland Revenue Commissioners* v. *City of London* (*as Conservators of Epping Forest*),[12] where a payment made under an Act of Parliament in the shape of the Epping Forest Act, 1878, was held to be an annual payment within rule 1 (*a*) of Case III. It would seem to follow that the interim income in the present case is not excluded from the application of the rule by the circumstance that the obligation under which it is paid is a statutory obligation.

(4) The payment in question must possess the essential quality of recurrence implied by the description "annual." But that description has been given a broad interpretation in the authorities. For example, in *Smith* v. *Smith*[13] Warrington L.J. said: "Again the fact that the payment is to be made weekly "does not prevent it from being annual provided the weekly pay- "ments may continue beyond the year." See also the case in the House of Lords of *Moss' Empires Ltd.* v. *Inland Revenue Commissioners*[14] where the payments in question fell to be made under a guarantee by the appellants of the payment of a fixed preferential dividend at a specified rate on the ordinary shares of another company, and were therefore in their nature contingent. Lord Macmillan said[15]: "At your Lordships' Bar it "was argued for the appellants that the payments were not "annual payments inasmuch as they were casual, independent, "not necessarily recurrent, and throughout subject to a con- "tingency. This argument commended itself to Lord Moncrieff, "but I am unable to accept it. There was a continuing obligation "extending over each and all of the five years to make a pay- "ment to the trustees for the shareholders in the event of the "company earning no profits or insufficient profits. The fact that "the payments were contingent and variable in amount does not "affect the character of the payments as annual payments. Rule "21 is not primarily a charging section, but is part of the "machinery of collection. The charging enactment is to be "found in rule 1 of Case III, Schedule D, whereby tax is imposed "on 'any interest of money whether yearly or otherwise or any "'annuity or any other annual payment . . . payable . . . as a

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[10] [1923] P. 191.
[11] Ibid. 197.
[12] [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.
[13] [1923] P. 191, 201.
[14] [1937] A.C. 785; 53 T.L.R. 867; 21 T.C. 264, 295; [1937] 3 All E.R. 381.
[15] [1937] A.C. 785, 793.

" 'personal debt or obligation by virtue of any contract.' I am " of opinion that the payments in question fall within these " words."

Lord Maugham said[16]: "It is, I think, to be noted that we " are not concerned here with the case of annual profits or gains " arising from a trade, as to which the decision in *Martin* v. " *Lowry*[17] would be decisive to show that in that context " 'annual' means 'in any one year.' In rule 21 'annual' " must be taken to have, like interest on money or an annuity, " the quality of being recurrent or being capable of recurrence. " The payments we are concerned with were to continue for five " years, subject to their being required to make up the guaranteed " annual dividend, and were plainly payments intended to supple-" ment so far as necessary the income of the recipients during " each of the years in question. In these circumstances I am of " opinion that they had the necessary quality of recurrence and " are within the terms of rule 21. In so deciding I apprehend " that your Lordships are not travelling in any way beyond the " existing decisions with regard to 'annual payments' in that " rule."

Having regard to these authorities we cannot view the revenue payments in the present case as lacking in the necessary quality of recurrence. Those falling to be made under section 22 (3) of the Coal Act of 1946, were expressly required to be made "in " respect of each of the two years beginning with the primary " vesting date and the first anniversary thereof respectively," and it is plain that the amount of the revenue payment in respect of each of those two years was to be the same. Those falling to be made under section 1 of the Coal Act of 1949 were expressly required to be made in respect of the year 1949 and subsequent years. It seems to us that the requirement of recurrence is amply satisfied here. We feel more difficulty as regards the interim income payable under section 22 (2) (*a*) as an addition to the compensation satisfied on any occasion and comprising a sum equal to interest at the prescribed new rate or to the compensation then payable, and will return to that relatively small matter later in this judgment.

(5) The payment in question must be in the nature of a "pure " income" profit in the hands of the recipient. By way of authority for this proposition we need only refer to *Howe* (*Earl*) v.

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[16] [1937] A.C. 785, 793, 795.

[17] [1927] A.C. 312; 43 T.L.R. 116; 11 T.C. 297, 320.

Inland Revenue Commissioners,[18] where Scrutton L.J. said: "It "is not all payments made every year from which income tax can "be deducted. For instance, if a man agrees to pay a motor "garage £500 a year for five years for the hire and upkeep of a "car, no one suggests that the person paying can deduct income "tax from each yearly payment. So if he contracted with a "butcher for an annual sum to supply all his meat for a year. The "annual instalment would not be subject to tax as a whole in the "hands of the payee, but only that part of it which was profits," and to the case of *In re Hanbury*,[19] where Lord Greene M.R. said: "There are two classes of annual payments which fall to be "considered for income-tax purposes." Then I think there is a misprint. I think it should read: "There is, first of all, that "class of annual payment which the Acts regard and treat as "being pure income profit of the recipient"—and those words are repeated by mistake—"undiminished by any deduction. Pay-"ments of interest, payments of annuities, to take the ordinary "simple case, are payments which are regarded as part of the "income of the recipient and the payer is entitled in estimating "his total income to treat those payments as payments which go "out of his income altogether. The class of annual payment "which falls within that category is quite a limited one. In the "other class there stand a number of payments, none the less "annual, the very quality and nature of which make it impossible "to treat them as part of the pure profit income of the recipient, "the proper way of treating them being to treat them as an "element to be taken into account in discovering what the profits "of the recipient are."

We should add that the payments held in *Howe (Earl)* v. *Inland Revenue Commissioners*[20] not to be within the provisions corresponding to rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules consisted of premiums covenanted to be paid on certain policies of insurance effected in connexion with a mortgage, and that the payments similarly excluded in *In re Hanbury*[21] were payments in respect of the use of certain chattels. It seems to us that the interim income payments in the present case were what Lord Greene M.R. termed "pure income profit" in *In re Hanbury*.[21] Mr. Bucher argued the contrary on the ground that the company was put to expense in the shape of the cost of the work necessary to be done by or on behalf of the company in connexion with the quantification of the compensation. But we do not see why this expense should prevent the interim income from being "pure income profit" in the sense intended by Lord Greene M.R. in that case. So far as attributable to the interim income as distinct from the compensation itself, it was expense incurred in fixing the amount of the annual payment to be made, and not expense to be set against the annual payment as representing the cost of earning it, so as to convert it from an annual payment within rule 1 (*a*) into a mere element in the ascertainment of a balance of profit. If a continuing partner agreed to pay an outgoing partner an annuity based on the average profits of the partnership business for the last three years, the outgoing partner to pay the cost of ascertaining the amount, we apprehend that the outgoing partner could not claim that the annuity was prevented by his expenditure in ascertaining its amount from being in his hands pure income profit.

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[18] [1919] 2 K.B. 336, 352.

[19] (1939) 20 A.T.C. 333, 334.

[20] [1919] 2 K.B. 336.

[21] 20 A.T.C. 333.

Mr. Bucher raised various other points, in addition to those already indicated, against the inclusion of interim income under the Coal Acts of 1946 and 1949 in the category of annual payments within rule 1 (*a*) of Case III of Schedule D.

He said that no time was fixed for payment save in so far as payments under section 22 (2) (*a*) of the Coal Act of 1946 fell to be made at the same time as the payment or satisfaction of the relative compensation. We do not regard this as material. The revenue payments under both Acts were to be made in respect of each of the years to which the relevant provisions of the Acts respectively applied. An obligation to pay a given sum in respect of each of a series of years implies, in the absence of some provision to the contrary, that the payment in question is to be made yearly, and an obligation in those terms would to our minds clearly possess the quality of recurrence required by the rule. In *Cunard's Trustees* v. *Inland Revenue Commissioners*[22] payments made from time to time under a discretionary power conferred on trustees were held to fall within rule 1 (*a*) of Case III of Schedule D.

Mr. Bucher further took the point as to the payments to be made under section 22 (2) (*a*) of the Coal Act of 1946 that their amount was variable at the will of the payer, inasmuch as the Treasury was to prescribe the rate or rates of interest by reference to which those payments were to be quantified. We think this

[22] [1946] 1 All E.R. 159; 27 T.C. 122.

point is met by *Cunard's Trustees* v. *Inland Revenue Commissioners*,[22] where the amounts of the payments depended on the discretion of the trustees.

Mr. Bucher also submitted that the revenue payments under the Coal Act of 1949 were not annual payments within the rule because under that Act the recipient might be called upon to repay some part of the amounts received in the event of his turning out to have received more than the prescribed aggregate amount. We think *Williamson* v. *Ough* [23] is, so far as it goes, against him, but it dealt with provisions in a will for the recoupment to capital of payments made thereout to beneficiaries on account of income which, in the view of the House of Lords, did not impose on the beneficiaries a personal obligation to repay. Obviously a mere series of loans would not be annual payments within the meaning of the rule, but we hardly think a contingent obligation to repay such as we are concerned with here would suffice to exclude the payments in question from the operation of the rule. However that may be, we think this point is concluded against Mr. Bucher by section 1 (6) of the Coal Act of 1949 which with reference, inter alia, to the provisions as to repayment contained in subsection (5) says this, and I have already referred to it: "Nothing in the last foregoing subsection "or in regulations made thereunder shall be construed as implying "that a payment made under this section to a colliery concern "or subsidiary, or a part of any such payment, is for any purpose "anything but a payment of income to the concern or subsidiary, "or as precluding the distribution as income of a payment so "made."

We do not think that the provisions of section 22 (5) of the Coal Act of 1946 as to repayment, which are confined to overpayments made owing to mistakes of fact, affect the matter.

Returning to the interim income provided for by section 22 (2) (*a*) of the Coal Act of 1946, we would observe that this interim income, though calculated as a sum equal to interest at the prescribed rate on the compensation to which it is added, is not described as interest of, or interest on, the compensation, and was held by the House of Lords in the *Butterley Co.'s* case [24] not to be such.

It cannot, therefore, well be brought within rule 1 (*a*) of Case III of Schedule D as "interest of money." Accordingly, we do not think it is covered by *Riches* v. *Westminster Bank Ltd.*,[25] where interest on damages, although paid uno flatu with them, was within the rule as being " interest of money." If it was not interest of money was it at all events an " annual payment " for this purpose? With some doubt we conclude it was not. It is true that it is calculated at an annual rate, but the section requires it to be paid, as regards each item of compensation with reference to which it is payable, at the same time as and by way of addition to the compensation in question. We find difficulty in discerning here the relevant quality of recurrence and therefore conclude that this relatively small part of the interim income with which this case is concerned is a proper subject of tax under Case VI of Schedule D.

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[22] [1946] 1 All E.R. 159.

[23] [1936] A.C. 384; 20 T.C. 194.

[24] [1957] A.C. 32.

For the reasons we have endeavoured to state we conclude that, apart from the question whether rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules have any application at all where, as here, the payer is a Minister of the Crown, the revenue payments received by the company under the Coal Acts of 1946 and 1949 would be taxable as annual payments under rule 1 (*a*) of Case III of Schedule D and subject accordingly to rule 21 of the General Rules, whereas the payments of interim income received by the company under section 22 (2) (*a*) of the former Act are taxable under Case VI.

The next point for consideration is whether a payment made by a Minister of the Crown can fall within rule 1 (*a*) of Case III of Schedule D and rule 21 of the General Rules. I have already referred to paragraph 1 of the rule. Paragraphs (2), (2A) and (2B) added to rule 21 of the General Rules in the Income Tax Act, 1918, by the Finance Act, 1927, s. 26, are in these terms: " Where any such payment as aforesaid is made by or through " any person, that person shall forthwith deliver to the Com- " missioners of Inland Revenue, for the use of the Special " Commissioners, an account of the payment, or of so much " thereof as is not made out of profits or gains brought into " charge, and of the tax deducted out of the payment or out of " that part thereof, and the Special Commissioners shall assess " and charge the payment of which an account is so delivered on " that person." Then (2A): " The Special Commissioners may, " where any person has made default in delivering an account " required by this rule, or where they are not satisfied with the " account so delivered, make an assessment according to the best

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[25] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469; sub nom. *Westminster Bank Ltd.* v. *Riches*, 28 T.C. 159.

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"of their judgment, and if any person neglects or refuses to "deliver an account so required, he shall forfeit the sum of one "hundred pounds over and above the tax chargeable." Then (2B): "All the provisions of the Income Tax Acts relating—(*a*) to "persons who are to be chargeable with income tax and to income "tax assessment; (*b*) to appeals against such assessments; (*c*) to "the collection and recovery of income tax; (*d*) to cases to be "stated for the opinion of the High Court, shall, so far as they "are applicable, apply to the charge, assessment, collection and "recovery of income tax under this rule, and the Special Commissioners shall, for the purpose of an assessment under this "rule, have any powers of a surveyor, and, for the purpose of "the representation of the Crown before the Special Commissioners on any appeal under this rule, any person nominated in "that behalf by the Commissioners of Inland Revenue shall have "all such powers as a surveyor has at and upon the determination "of an appeal."

It will be observed that under paragraph (2) the person by or through whom the relevant payment is made is enjoined to deliver an account of the payment and of the tax deducted thereout, and the Special Commissioners are enjoined to assess and charge the payment of which an account is so delivered on that person.

It will be observed further that under paragraph (2A) the Special Commissioners may make an estimated assessment on any person who has made default in delivering the prescribed account, and any person who neglects or refuses to deliver the prescribed account is to forfeit £100 over and above the tax chargeable.

Finally, it will be observed that the provisions of the Income Tax Acts as to the collection and recovery of tax applied by paragraph (2B) to tax under the rule include section 169 (1) of the Income Tax Act, 1918, which provides that "Any tax charged "under the provisions of this Act may be sued for and recovered, "[with full costs of suit,] from the person charged therewith in "the High Court as a debt due to the Crown . . ."

In view of these provisions we cannot construe the word "person" in rule 21 as including the Crown. The obligation to deduct tax imposed by paragraph (1), and the other obligations and penal provisions laid upon the person by or through whom the payment is made by paragraphs (2), (2A), and (2B), seem to us to show quite clearly that the word "person" in the rule is not to be construed as including the Crown.

This conclusion, we think, accords in its result with the views expressed in the House of Lords in *Madras Electric Supply Corporation Ltd.* v. *Boarland*.[26] The actual decision in that case was that the words "If at any time . . . any person succeeds to any "trade . . . which until that time was carried on by another "person" in rule 11 (*a*) of Cases I and II of Schedule D included the case of succession by the Crown, because the rule did not operate to charge the person succeeding with any tax. But the principles underlying the immunity of the Crown from tax imposed by any statute were discussed, and there was some divergence of opinion amongst their Lordships on that subject. Lords Reid and Macdermott preferred the view that the word "person" in a provision imposing tax on the "person" referred to should, as a matter of construction, be held not to include the Crown, but that there was no reason for denying the word "person" its ordinary meaning (which would include the Crown) in a provision which did not operate to impose any tax on the person referred to. Lord Keith, on the other hand, preferred the view that the word "person" must be construed as including the Crown even in a charging provision, but that where the effect of that construction would be to charge the Crown with tax, the Royal Prerogative operated to exempt the Crown from its application.

Lord Tucker said[27]: "My Lords, I am not persuaded that "the decision of this appeal calls for an historical investigation of "the true nature of the royal prerogative or its precise impact "upon parliamentary legislation. It is beyond dispute that the "Income Tax Acts do not operate to charge the Crown with pay-"ment of tax—in other words, the immunity derived from the "prerogative has not been affected by express words or by neces-"sary implication. This being the position, I can see no reason "why the word 'person' in those parts of the Acts which do not "impose a charge to tax should be construed otherwise than in its "ordinary and natural meaning, which clearly includes the "Crown."

Lord Oaksey said[28]: "My Lords, I agree with my noble and "learned friend, Lord Tucker, that it is unnecessary in this case "to decide whether the Crown's admitted immunity from taxa-"tion depends upon the construction of the statute or arises "from the prerogative in some other way," and he concluded his speech thus: " The words ' the tax payable for all years of assess-" ' ment by the person succeeding ' must, I think, be construed " to mean the tax, if any, and not to deprive the taxpayer of " balancing allowances to which he would have been entitled " because his successor is not taxable."

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[26] [1955] A.C. 667; [1955] 1 All E.R. 753; sub nom. *Boarland* v. *Madras Electric Supply Corporation Ltd.*, 35 T.C. 612, 633.

[27] [1955] A.C. 667, 691, 692.

[28] Ibid. 667, 682.

Whether the immunity of the Crown is founded upon construction, or on prerogative overriding construction, the result appears to us to be the same, namely, that the charging provisions of Taxing Acts do not extend to the Crown unless the Crown is included therein by express terms.

The only possible difference might be that if the exemption is assigned to prerogative, it is arguable that the Crown could submit to be bound by waiver. No such argument was, however, addressed to us, and we find it difficult to hold that categorical provisions such as those here in question, couched in language which is in terms appropriate to taxpayers and taxpayers only, are to be considered as binding upon the Crown unless and until the Crown asserts the prerogative, so that the Crown can elect to be bound or not by asserting or refraining from the assertion of the prerogative, and having asserted the prerogative once more become bound by waiving it.

We think that whether construction or prerogative is the true basis of the immunity, the result must be that the Crown is excluded ab initio from the application of provisions such as those now under consideration.

We should add a reference to *Coomber* v. *Justices of the County of Berks*,[29] where Lord Watson said: " The exemption " of the Crown from the incidence of rating statutes is a general " privilege, and is nowise dependent upon the local or imperial " character of the rate. It takes effect in all cases when the " Crown is not named in the statute, or, I should prefer to say, " in all cases where the enactments do not take away the " privilege, either in express terms or by plain and necessary " implication."

In *Constantinesco* v. *Regem*[30] the House of Lords, in refusing to entertain the contention that rule 21 did not apply to the Crown because it had been raised too late, said nothing to suggest that if it had been raised in time it might not have succeeded.

Rules 19 and 21 of the General Rules on the one hand, and rule 1 (*a*) of Case III of Schedule D on the other, are co-extensive, so that everything to which rule 1 (*a*) applies must also fall within rule 19 or 21, and nothing can fall within rule 1 (*a*) unless it falls either within rule 19 or within rule 21.

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[29] (1883) 9 App.Cas. 61, 76; 2 T.C. 1.

[30] (1927) 43 T.L.R. 727; 11 T.C. 730, 745.

Rule 19, which deals with interest, annuities, etc., payable wholly out of profits or gains brought into charge to tax, cannot apply to the Crown, because the Crown, not being liable to tax, has no profits or gains answering that description. This suggests that the complementary provisions of rule 21 are similarly limited in their application to persons other than the Crown. Moreover, rule 21 contemplates that a person to whom it applies may have some profits or gains brought into charge, and make payments partly out of such profits or gains and partly otherwise, a position which for the same reason could not arise in the case of the Crown.

It may further be noted that certain payments out of public funds are separately provided for in the rules applicable to Case III of Schedule D, which indicates that rule 1 (*a*) was not intended to include them. Reference may also be made, for example, to the special machinery provided in Schedule C to deal with the deduction of tax from various kinds of payments made out of the public revenue. One may also contrast with the Coal Acts of 1946 and 1949 the special provisions as to tax which are to be found in sections 10 and 23 of the Transport Act, 1947, and sections 11 and 28 of the Electricity Act, 1947.

For these reasons we conclude that the revenue payments with which this case is concerned, while otherwise possessing the characteristics requisite for their inclusion in rule 1 (*a*) of Case III of Schedule D, are excluded from that rule by the circumstance that the payer is the Crown, represented by one of Her Majesty's Ministers.

It follows, in the view we take, that the whole of the interim income payments fall within Case VI of Schedule D, and it only remains to consider whether such payments are nevertheless, as contended by Mr. Pennycuick for the Special Commissioners, taxable as income of the years in which they were received, or, on the other hand are, as contended by Mr. Bucher, to be treated as accruing from day to day over the period in respect of which they were paid, the amount attributable for tax purposes to each of the three years under appeal being ascertained on that footing.

Case VI of Schedule D comprises "Tax in respect of any "annual profits or gains not falling under any of the foregoing "Cases, and not charged by virtue of any other Schedule." Rule 2 of the rules applicable to Case VI provides that "The "computation shall be made, either on the full amount of the

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"profits or gains arising in the year of assessment, or according "to an average of such a period, being greater or less than one "year, as the case may require . . ."

Mr. Pennycuick relied on the general principle that for income tax purposes a payment in the nature of income must be treated as income of the year in which it is received. He admitted that exceptions to the general rule were to be found in cases involving the assessment of the profits of a trade or profession under Case I or Case II, but claimed that no similar exception existed where, as here, the receipt in question is in the nature of a pure income profit as distinct from an element to be brought into computation for the purpose of arriving at a balance of profits and gains.

Mr. Pennycuick referred to the judgment of Rowlatt J. in *Grey* v. *Tiley*,[31] where the taxpayer had become entitled to a commission in 1920–21 and received only part of it in that year and the balance in subsequent years and Rowlatt J. held that for the purposes of tax under Case VI the income arose when the payments on account of the commission were received. Rowlatt J. said [32]: "Now the position that the Solicitor-General takes up, "as I understand it, is this. He does not contend that at the "end of the year, in this case 1920–21, there was a right on the "part of the Revenue to assess this gentleman to this tax because "he earned the money. I take it he does not say that, and it "would be very remarkable if that was the law because it would "mean that a man was taxed before he had got anything to pay "it out of. As I understand the position, and this is what I am "addressing myself to all the time, the position taken is this, that "if and when the money is paid, then arises the right to assess "and that right, then, relates back to the year when the money "was earned. I am bound to say, I think, that it strikes one as "a somewhat curious proposition, looking at the Special Case "which I have referred to, that when the end of the year comes "it becomes ruled out and the question is whether the accounts "ought to be rectified or anything of that kind. When the end "of the year comes is it not the case that a man either has or has "not incurred tax for that year? It seems to me that a very "great confusion and very great difficulty arises if, as overdue "payments of interest on foreign securities or profits of this "kind fall due, a series of back assessments in respect of back "years are to be made, not because there is a mistake about what "ought to have been assessed in that year but because, by relation back, the facts of that year have become different facts

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[31] (1932) 16 T.C. 414.

[32] Ibid. 422.

" afterwards, because that is what it must mean. I do not myself " feel that that is right but I think in this case I really am bound, " for what it is worth, by my own decision in *Leigh's* case.[33] " The whole thing may, of course, be opened elsewhere, but I " think I am really bound by my own decision in that case. " That was a clean case. It was the case of a man who had " bonds and had bought them, it does not matter whether he " bought them or not but he had them, on which there were many " years of arrears of interest. They were foreign bonds or " colonial bonds but an agent paid them in this country and, " therefore, they were not taxed as foreign securities but they " were taxed under the special provisions of the Act, which I need " not refer to, by a section dealing with the matter and were " liable to suffer deduction of the tax in force at the date of " payment. Those six years of arrears were paid at once and the " tax was deducted at the rate of the year of payment. That " has no significance because, even if they fall into the six Income " Tax years by reason of the provisions which I have indicated, " the rate of tax ought to be the rate of tax in the year of pay- " ment. That is artificially provided for by the legislature. " That does not help the argument, but without the help of that " decision I came to say this, that for super-tax purposes he must " be held to have received all those instalments of interest in " one year. The struggle in that case was—Mr. King was the " struggler—to put them back to the previous years by virtue of " the word 'receivable,' just as here the struggle is to put them " back by virtue of the word 'arising.' I said in that case that " 'receivable' did not affect the matter at all, but the substance " of the thing was that I thought and held that those receipts " must be treated as all appertaining—I used that word—to the " year in which they were actually received. I am bound to say " that I think I ought to follow that in this case, though I still " remain of the opinion independently that in dealing with these " matters I want it to be understood that I say nothing more than " this, that in dealing with these casual profits coming under Case " VI, you must look at the time when the casual profits come in " and not go back to the year ex post facto in which the contract " was made and when the profits subsequently come in."

Mr. Pennycuick also referred to *Dewar* v. *Inland Revenue Commissioners*,[34] where tax was claimed upon unpaid interest on a legacy and it was held that inasmuch as the interest in question had not been received, it was not chargeable to tax. Lord Hanworth M.R. said[35]: "Then I come to *Leigh* v. *Inland Revenue* "*Commissioners*,[36] in which Rowlatt J., whose experience and "knowledge of the Income Tax Acts is quite unrivalled, says: "'It is to be remembered that for income tax purposes "'"receivability" without receipt is nothing. Before a good "'debt is paid there is no such thing as income tax upon it.' "I agree with those words. It appears to me that the reason "why you make up the return for the particular year is that you "look to see in the course of that twelve months what has been "received, and it may be that a good debt will be paid in a "subsequent twelve months and not in the twelve months in "respect of which you are making your declaration, and you "cannot anticipate that the money will come in in its proper "place in the following twelve months. I think Rowlatt J. was "right in saying that for income tax purposes receivability without "receipt is nothing." We need not make further reference to *Leigh's* case,[36] the effect of which is sufficiently indicated in the citations made above.

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[33] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.

[34] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561.

We were also referred to *Johnson* v. *W. S. Try Ltd.*,[37] where Lord Greene M.R., after referring to the practice of including in the accounts of a trade for the purpose of computing its profits debts due but unpaid, said: "But I venture to think in one sense "that is an anomaly, because it is a departure from what I have "always understood to be the fundamental conception of Income "Tax legislation—that you ascertain your profits in reference to "your receipts. The reason why that exception is brought in is "that it is in accordance with ordinary commercial practice to "treat debts in that way."

Mr. Bucher placed some reliance on *Lambe* v. *Inland Revenue Commissioners*,[38] where it was held that interest on certain debentures which was due and payable but unpaid should not be included in the taxpayer's total income for surtax purposes because it had not been received. That accords with the cases to which we have already referred, and does not help Mr. Bucher. But Finlay J. used language[39] suggesting that if and when the interest was in fact paid it should not be treated as income of the year of payment but should be spread over the years in respect of which it was payable and charged to tax accordingly. But this expression of opinion was unnecessary for the purpose of Finlay J.'s decision and we cannot regard it as outweighing the views to the contrary expressed in the other cases to which we have referred.

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[35] [1935] 2 K.B. 351, 366.

[36] [1928] 1 K.B. 73, 77.

[37] (1946) 27 T.C. 167, 181; 62 T.L.R. 355; sub nom. *Try (W. S.) Ltd.* v. *Johnson* [1946] 1 All E.R. 532.

[38] [1934] 1 K.B. 178; 18 T.C. 212.

[39] [1934] 1 K.B. 178, 186.

Mr. Bucher's argument involves construing the word "arising" in rule 2 of the rules applicable to Case VI of Schedule D as meaning "arising in point of entitlement" and treating the interim income as accruing in point of entitlement from day to day. If that were right, then logically the amount arising in each year in the sense attributed to that expression by Mr. Bucher, although not in fact paid, would have been taxable as income of that year. That conclusion seems contrary to the effect of the cases to which we have referred, and Mr. Bucher did not seek to support it. His contention was that the interim income, although arising (in his sense of the expression) year by year, did not become taxable until it was received and then was not taxable as income of the year of receipt but as income of the years over which it was accruing in point of entitlement. This would involve the reopening of assessments and the raising of additional assessments at any distance of time from the year 1947–48 onwards according to the period taken to work out the compensation provisions under the Coal Acts of 1946 and 1949. We cannot think this is right, and in our view the expression "arising" in rule 2 of the rules applicable to Case VI must be construed as meaning "received."

Mr. Bucher pointed out the reference to Case VI of Schedule D in section 35 of the Finance Act, 1926, which by subsection (1) provides as follows: "Where in the case of any profits or gains "chargeable under Case I, Case II, . . . or Case VI of "Schedule D it is necessary, in order to arrive at the profits "or gains or losses of any year of assessment or other period, "to divide and apportion to specific periods the profits or gains "or losses for any period for which the accounts have been made "up, or to aggregate any such profits or gains or losses or any "apportioned parts thereof, it shall be lawful to make such a "division and apportionment or aggregation: . . ."

But we take this provision to be directed to cases in which it is necessary to compute profits and losses for the purpose of arriving at a balance of gains, as in the ordinary case of a trade under Case I of Schedule D. That necessity might arise under Case VI when applied to activities analogous to but not actually constituting a trade. Compare *Forth Conservancy Board* v.

Inland Revenue Commissioners.[40] Accordingly, we do not think section 35 (1) of the Act of 1926 advances Mr. Bucher's argument in the present case, where the only income in question is in the nature of a pure income profit.

We should also refer to *In re Sebright*,[41] on which Mr. Bucher to some extent relied. The question with which Vaisey J. was there concerned was at what rate tax should be deducted from arrears of a jointure in the adjustment of the rights of beneficiaries inter se, and we do not think it really touches the point at issue in the present case, which concerns the years to which the interim income received by the company should for tax purposes be held to belong.

We are conscious that we have not referred in detail to all the points raised in the exhaustive arguments presented to us, but we hope we have dealt adequately with the essential matters.

For the reasons we have endeavoured to state we conclude that the apportionments under appeal in the first of the three cases should have been made on the footing that the interim income was taxable under Case VI of Schedule D and not under Case III of that Schedule, but that this will not affect the actual result.

The other two cases concern sub-apportionments to the two companies concerned under the provisions of section 21 of the Finance Act, 1922, of their appropriate proportions of the total income of the first appellant company, and accordingly involve precisely the same question, which must be answered with respect to the second and third appellant companies in the same way.

F. N. Bucher Q.C. for the company (on the question of costs): As the court has held that the payments fall within Case VI and not Case III and tax has therefore been improperly deducted by the Crown in making the payments, the company should be assessed on the amounts actually received as contended by the Crown, i.e., the net amounts and not the grossed up amounts, and the apportionments made by the Special Commissioners were therefore excessive.

JENKINS L.J. This point was not raised in the argument. The best way of dealing with this will be to postpone the drawing up

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[40] [1931] A.C. 540; 47 T.L.R. 429; sub nom. *Inland Revenue Commissioners* v. *Forth Conservancy Board*, 16 T.C. 103, H.L.

[41] [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547.

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of the order for, say, a week for the parties to consider the matter and failing agreement for the case to be put in the list again for further argument.

March 12. After further argument the court held that, on the case stated, and in the circumstances of the case, this point was not open to the company and it dismissed the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Tamplin, Joseph & Flux; Solicitor, Inland Revenue.*

J. A. G.

GRACE RYMER INVESTMENTS LTD. *v.* WAITE AND OTHERS.

[1957 G. 609.]

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1958
June 26, 27;
July 2.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Landlord and Tenant—Rent restriction—Premium—Agreement to let before landlord's purchase—Three years' rent paid in advance—Whether illegal premium—Effect—Tenant let into possession before completion of landlord's purchase—Completion of purchase and legal charge—Possession application by mortgagee—Rights of tenant—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 40), *s.* 2 (1), (5), (6).

Land Registration—Effect of registration—Mortgage—Transfer and legal charge registered simultaneously—Rights of tenants in possession against chargee—Land Registration Act, 1925 (15 & 16 *Geo.* 5, *c.* 21), *ss.* 20 (1), 27, 70 (1) (*g*) (*k*).

In October, 1955, mortgagors took three years' rent in advance from three persons who each wanted a flat. On November 28, 1955, the mortgagors entered into a contract to purchase the property in which these flats were situated. It was registered with an absolute title at the Land Registry. Before December 30, these three persons went into occupation of their flats. On December 30, 1955, the purchase was completed and a transfer was duly executed by the vendor in favour of the mortgagors, and on the same day a legal charge was executed by the mortgagors in favour of the plaintiff company. Both these transactions were followed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. The mortgagors having defaulted in their payments, the plaintiffs, as mortgagees, sought to recover possession of the property. The tenants claimed to be entitled to remain in possession:—

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Held, (1) that assuming that the payment of three years' rent in advance constituted illegal payments within section 2 of the Landlord and Tenant (Rent Control) Act, 1949,[1] and that the mortgagors in requiring these payments had committed a criminal act, the tenants in making the payments were not so tainted with that criminality as to be disabled from setting up their bargains with the mortgagors and they were entitled to set up the rights they had under their contracts of tenancy.

Gray v. *Southouse* [1949] 2 All E.R. 1019 approved.

(2) That the lump sum payments were rent in advance for the purposes of the general law.

Green v. *Rheinberg* (1911) 104 L.T. 149 applied.

Braythwayte v. *Hitchcock* (1842) 10 M. & W. 494 distinguished.

(3) That the tenants as against the mortgagors had acquired "an interest in land by virtue of taking possession" under section 55 (*c*) of the Law of Property Act, 1925, and that there was a moment of time on December 30, 1955, when the mortgagors were absolute beneficial owners of the property and therefore were estopped as against the tenants from denying their rights as tenants.

(4) That section 27 of the Land Registration Act, 1925,[2] when considered with sections 19, 20 and 26 of that Act, indicated that a charge was only completed by registration; that in section 27 (3) the phrase a "charge by way of legal mortgage shall take effect "from the date of the delivery of the deed containing the same" did not mean that a legal estate was created in favour of a chargee at the moment a charge was executed; and that, accordingly, the plaintiffs, as mortgagees, must be treated as having notice of the interests of the tenants who were in occupation at the date of the charge, and the mortgagees were in no better position than the

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A "person shall not, as a condition of "the grant, renewal or continuance "of a tenancy to which this section "applies, require the payment of any "premium in addition to the rent ". . . (6) A person requiring any "premium in contravention of this "section shall be liable on summary "conviction to a fine not exceeding "one hundred pounds, and the "court by which he is convicted may "order the amount of the premium, or "so much thereof as cannot lawfully "be required under this section, to be "repaid to the person by whom it "was paid."

[2] Land Registration Act, 1925, s. 27: "(1) A registered charge "shall, unless made or taking effect "by demise or sub-demise, and subject "to any provision to the contrary "contained in the charge, take "effect as a charge by way of legal "mortgage.

"(2) Subject to the provisions of "the Law of Property Act, 1925, a "registered charge may contain in "the case of freehold land, an express "demise, and in the case of leasehold "land an express sub-demise of the "land to the creditor for a term of "years absolute, subject to a proviso "for cesser on redemption.

"(3) Any such demise or sub-"demise or charge by way of legal "mortgage shall take effect from the "date of the delivery of the deed con-"taining the same, but subject to "the estate or interest of any person "(other than the proprietor of the "land) whose estate or interest "(whenever created) is registered or "noted on the register before the date "of registration of the charge."

mortgagors against the tenants and were not entitled to possession as against them.

Decision of Danckwerts J., ante, p. 314; [1958] 1 All E.R. 138 affirmed.

APPEAL from Danckwerts J.[3]

P. W. Waite, D. W. Waite and W. H. Waite (hereinafter called " the Waites ") were dealers in property. As a result of an advertisement Mrs. Neill, the wife of the defendant Terence Neill, went to the Waites' office and was taken to see a flat at 183, Devonshire Road, Forest Hill. She was told that the rent was £2 11s. 6d. a week (inclusive of rates) and was asked for three years' rent in advance. Accordingly, she paid by cheque to the Waites the sum of £401 15s. and received from them a receipt dated October 11, 1955, for that sum " as advance rent." The receipt stated that this was payable to the Waites as " stake-" holders " and that the moneys were deemed to be returnable in the event of non-acceptance of tenancy by either party. It was also stated that at the end of the advance term, rent was to be paid weekly or by mutual arrangement, and that the £10 10s. letting fee was not payable until the tenant was accepted and received the key. Some time later, however, Mrs. Neill was told by the Waites that she could not have the flat, and was offered a flat at 8, Church Rise, Lewisham, the subject of the present action.

Also as the result of an advertisement the defendant, Frederick Spurling, called on the Waites on August 22, 1955, and was shown a flat at 6, Sydenham Park, which was said to be available at a rent of 36s. per week. He paid a deposit of £25 and on August 26, 1955, he paid a further sum of £290 18s., making a total of £315 18s.; this was paid in cash and he was given a receipt in similar terms to that given to the Neills. His wife, however, did not like the flat, and subsequently they were shown a number of other flats. Eventually they were shown a flat on the first floor of 8, Church Rise, Lewisham, for which they were told the rent would be higher. Spurling did not object to that, but said that he could not pay any more in advance and so the Waites agreed to reduce the period for which the rent was paid in advance.

The defendant, Alexandrina Hitchen (hereinafter called " Mrs. " Hitchen "), as the result of the Waites' advertisement, telephoned and was given the Waites' address and she was taken by one of the Waites to 8, Church Rise, and was shown the top flat, the rent of which was to be £2 0s. 6d. per week inclusive, three years' rent being asked in advance. £100 was paid to the Waites as a "holding deposit." She was told that she could occupy it when it was completed—in a month or six weeks. Accordingly, she gave the Waites a cheque for the balance and was given a receipt which stated that she had paid £315 18s., being three years' rent in advance, for the top flat. She was told that there would be a letting fee of £10 10s. when she received the key.

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[3] Ante, p. 314; [1958] 1 All E.R. 138.

By a contract dated November 28, 1955, the Waites agreed to purchase the freehold property 8, Church Rise, Lewisham, from Colonel George Sinclair (who was the manager of the plaintiff company, Grace Rymer Investments Ltd.) for £2,300. By the terms of the contract the vendor agreed to leave on mortgage the sum of £1,700, repayable over a period of 12 years, the mortgage deed to be in the form already agreed. The National Conditions of Sale were incorporated in the contract, and condition No. 7 provided that if the purchaser was let into occupation of the property before the actual completion of the purchase, then, as from the date of his going into occupation and until completion, the purchaser should be the licensee and not the tenant of the vendor.

The property was registered with absolute title under the Land Registration Act, 1925. Completion took place on December 30, 1955, when a transfer in accordance with the requirements of the Act was executed by Colonel George Sinclair in favour of the Waites, and on the same day a registered charge was executed by the Waites in favour of the plaintiff company to secure the principal sum of £1,700, with interest at 6 per cent. per annum repayable by monthly instalments of £16 18s. over a period of 12 years. There was the usual provision making the whole balance secured immediately payable in case of default in payment of two consecutive instalments. The statutory powers of leasing were not excluded or limited by the charge. Both these transactions were followed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. The same solicitors acted for Colonel George Sinclair and the plaintiff company.

Before the completion of the Waites' purchase they had given keys of three flats to the tenants who had made payments in advance. Mr. and Mrs. Neill went into possession of the ground floor flat on December 17, 1955, Mr. and Mrs. Spurling went into possession of the middle flat on December 16, 1955, and Mrs. Hitchen went into possession of the top flat on December 27.

On July 12, 1956, instalments under the legal charge were in arrear, and the plaintiff company on October 10, 1956, obtained judgment against them for £1,655 10s. 10d. and costs. On July 26, 1956, the plaintiff company appointed a receiver. As a result of the receiver's attempts to collect rents, the claims of the last four defendants, Mr. and Mrs. Neill, Frederick Spurling and Mrs. Hitchen, came to the notice of the plaintiff company. Mrs. Neill did not claim to be a tenant.

On April 8, 1957, the plaintiffs took out this summons claiming possession. The three Waites were the first three defendants to the summons, Mr. and Mrs. Neill, Frederick Spurling and Mrs. Hitchen were the last four defendants. The Waites did not contest the plaintiffs' claim. The other defendants claimed to be entitled to remain in possession as tenants.

Danckwerts J. dismissed the plaintiffs' action for possession.

The plaintiffs appealed.

Harold Christie Q.C. and *Peter Oliver* for the plaintiffs. The plaintiffs' first criticism of Danckwerts J.'s judgment is that he held that the transactions between the Waites and the other defendants resulted in the creation of tenancies. The conditions requisite for their creation did not exist. The plaintiffs rely on sections 52, 53 and 54 of the Law of Property Act, 1925. The documents which the Waites signed cannot be construed as leases. An oral tenancy may be created for a term of less than three years: *City Permanent Building Society* v. *Miller*.[4] The fact that the purported tenancies were not in writing is fatal to their validity. If the documents in question had any effect at all, they were agreements to grant leases of which the defendants might have obtained specific performance. Such an agreement is not equivalent to a lease.

Secondly, the plaintiffs contend that the payments made by the defendants to the Waites were unlawful premiums within section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and, accordingly, the defendants cannot rely on the payments.

Thirdly, the plaintiffs rely on section 27 (3) of the Land Registration Act, 1925. The effect of that section was to make the charge given to the plaintiffs by the Waites effective as a legal charge from its date, that is, December 30, 1955, while the transfer to the Waites did not vest any legal estate in them until it was registered on January 9, 1956: see section 19 (1) of the Land Registration Act, 1925. The defendants, accordingly, could not have obtained terms of years before the plaintiffs' charge came into operation. That charge became effective on December 30, 1930. There is nothing in the Act of 1925 which provides that a charge shall not be effective until it is registered. [Reference was made to sections 18, 19, 20, 25, 26, 27 and 37 of the Land Registration Act, 1925, and to the Land Registration Rules, 1926.]

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[4] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

The decision in *Coventry Permanent Economic Building Society* v. *Jones*[5] did not relate to registered land. It is clear that when the Waites purported to grant these tenancies they had no power to do so. For there to be a lease, there must be payment of rent: *Braythwayte* v. *Hitchcock.*[6] Here the defendants never paid any rent. If any tenancies were created, it must have been after the Waites had acquired sufficient interest in the premises to feed the estoppel. The estoppel could not have been fed before January 9, 1956, when the transfer to the Waites was registered: *E. H. Lewis & Son Ltd.* v. *Morelli.*[7] Payment of rent is an essential feature of an estoppel. A landlord cannot deny his tenant's title if he has taken rent. No rent was taken by the Waites here after they had obtained a title to the property. This case is covered by the decision in *Hughes* v. *Waite.*[8] Here the plaintiffs are not estopped from denying that tenancies were created. Calling a lump sum payment rent does not make it rent. [Reference was made to *Hitchcock* v. *Waite.*[9]]

The payments which the defendants made to the Waites were fines: *City Permanent Building Society* v. *Miller*[10]; *Woods* v. *Wise.*[11] These payments were unlawful premiums within section 2 (1) of the Act of 1949. Whether or not the nature of these payments vitiated the whole transactions, they made it impossible for the defendants to obtain specific performance of these agreements.

The defendant Mrs. Hitchen has the strongest case; she had something in writing relating to her flat. The other defendants had nothing. Mrs. Hitchen's document is not capable of being construed as a lease or an agreement for a lease. None of the defendants had leases. The agreements, not being in writing, were rendered void by section 52 of the Law of Property Act, 1925. At most what the defendants took were tenancies at will. [Reference was made to sections 53 and 54 of the Law of Property Act, 1925.] If there were here any documents which could be construed as agreements, they were not agreements of which specific performance would have been granted. The defendants have no rights as against the plaintiffs.

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[5] [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901.

[6] (1842) 10 M. & W. 494.

[7] [1948] W.N. 442; 65 T.L.R. 56; [1948] 2 All E.R. 1021.

[8] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

[9] *The Times*, May 30, 1957, p. 15; 169 E.G. 755.

[10] [1952] Ch. 840.

[11] [1955] 2 Q.B. 29; [1955] 1 All E.R. 767.

Geoffrey Cross Q.C. and *N. F. Stogdon* for the defendants Terence Neill, Frederick Spurling and Mrs. Hitchen. The judge has found, as a fact, that the defendants entered into possession before any interest was created in favour of the plaintiffs. These defendants entered into possession on the footing that they should be weekly tenants on terms which had been agreed. It is not admitted that they could not have obtained specific performance of their agreements with the Waites. [Reference was made to Foa's Law of Landlord and Tenant, 8th ed., p. 349, para. 512.] The test to be applied here is whether the Waites could have got the defendants out of possession. If a man has paid a sum by way of rent in advance, and then goes into possession, the antecedent payment supports the tenancy once he has gone into possession. The defendants were not trespassers. When they took possession they became weekly tenants. It is incorrect to say that there can be no tenancy unless rent has been paid after occupation has been entered into. Actual payment is not necessary; any act equivalent to payment is sufficient: *Cox* v. *Bent.*[12]

If the plaintiffs are right, when the purchase had been completed and the Waites had got the legal estate, the Waites or their trustee in bankruptcy could have contended that the tenants had no rights as against them. That must be wrong; the tenants were let into occupation on the footing that they were to have tenancies.

Until December 30 the Waites had only an equitable interest in the property. When they had paid the purchase-money and a transfer had been executed in their favour the vendor became a bare trustee of the legal estate until January 9, when the transfer was registered. Until completion on December 30 the plaintiffs had no interest in the property and they did not get any legal interest until January 9 when the Waites got the legal

[12] (1828) 5 Bing. 185.

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estate. The plaintiffs' charge was subsequent in time. Harman and Danckwerts JJ. both assumed that under the Land Registration Act, 1925, the transfer and charge both operated only in equity until after registration.

Before the plaintiffs got their legal charge the Waites were in a position to give the tenants a legal interest. A tenancy is a contractual interest; when the Waites got the legal estate the tenants had a right to specific performance: *Walsh* v. *Lonsdale*.[13] Section 54 of the Law of Property Act, 1925, does not apply here.

Section 70 (1) (*g*) of the Land Registration Act, 1925, applies the rule in *Hunt* v. *Luck* [14] (exemplified in *Green* v. *Rheinberg* [15]) to registered land, that is, that a person acquiring an interest for value takes subject to the rights of persons in possession if he does not inquire. The plaintiffs made no inquiry of the tenants. That omission amounted to negligence. If the plaintiffs had inquired, the tenants would have said that they had a specifically enforceable interest in equity against the Waites. These rights were rights in rem and, rent having been paid in advance, the plaintiffs took subject to them. The plaintiffs were bound by all the equities which the tenants could enforce against the Waites: *Barnhart* v. *Greenshields*.[16]

[Lord Evershed M.R. If Mrs. Hitchen's tenancy was to be effective, was it not necessary for it to be in writing?]

Section 54 of the Act of 1925 applies only to an executory agreement for a tenancy. Mrs. Hitchen was in possession. At the date when the charge was created, the tenants had the right to have legal interests created in their favour, and meanwhile to remain in possession week by week having the weekly rent set off against their prepayment.

The Waites could not have said that the agreements were illegal under the Rent Acts. The plaintiffs must be taken to have had notice of the tenants' interest when they took the charge. The feeding of the estoppel on January 9 was, therefore, immaterial. The case is distinguishable from *Hughes* v. *Waite* [17] and *City Permanent Building Society* v. *Miller*,[18] where the occupants had not taken possession at the date of the charge.

Mrs. Hitchen had a term of slightly under three years. The Waites could not have said that she was let in as a mere licensee. The occupants were, as far as was possible, let in as tenants and the Waites would have been estopped from denying that they were tenants. Their three-year terms would start from the date when the tenancy was accepted. This is different from the position where a mortgagor in possession grants a lease. Then it is common sense that he should not be able to prejudice the mortgagee. A person entering under an agreement enforceable in equity and paying rent weekly is at law a weekly tenant. The Waites would be estopped from denying that Mrs. Hitchen was their tenant and they could not have given her notice before the end of the 156th week of her tenancy, notwithstanding that at the time when the agreement was made the Waites had only an interest which was defeasible in the event of non-completion. The plaintiffs could not have acquired any legal interest before the Waites did.

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[13] (1882) 21 Ch.D. 9.

[14] [1902] 1 Ch. 428; 18 T.L.R. 265.

[15] (1911) 104 L.T. 149.

[16] (1853) 9 Moo.P.C. 18.

[17] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

[18] [1952] Ch. 840.

As to the validity of the agreement, it is only necessary to show that it is one which could be specifically performed. Section 2 of the Landlord and Tenant (Rent Control) Act, 1949, does not support the suggestion that the agreement was wholly unenforceable.

[LORD EVERSHED M.R. The judge seems to have thought that the payment in advance was a premium. Does that taint the arrangement? See the observation of Romer L.J. in *Woods* v. *Wise*.[19]]

Assuming that the payment was a premium, the question is whether the illegality was such as to disqualify the tenants: see Megarry on the Rent Acts, 8th ed., p. 613. In circumstances coming within the proviso to section 2 (5) of the Act of 1949 the tenancy is voidable at the option of either party, but the court held in *Haberman* v. *Westminster Permanent Building Society*[20] that that only referred to executory agreements. A fortiori an agreement made after the Act is not voidable. It would be inconsistent with the framework of the Act to say that this was a nullity. The offence is requiring a premium, and it has been committed once the landlord makes the demand. He could be convicted, even if the tenant refused to pay. In *Gray* v. *Southouse*[21] there was some evidence that the tenant had done something towards the conception of the crime, but normally it could not be said that a tenant, who submitted to the demand, thereby became a party to the crime.

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[19] [1955] 2 Q.B. 29; [1955] 1 All E.R. 767.

[20] [1950] 2 K.B. 294; 66 T.L.R. (Pt. 1) 1068; [1950] 2 All E.R. 16.

[21] [1949] 2 All E.R. 1019.

[Romer L.J. But the vital point is whether this was an agreement of which the court would grant specific performance. Would the court order the performance of a contract under which the consideration paid was illegal?]

In *Hitchcock* v. *Waite*[22] Vaisey J. decided against the tenants, basing his judgment apparently on the dictum of Hodson L.J. in *Miller's* case,[23] that is, that there had been a criminal offence by the Waites to which the tenants would be a party.

The Rent Acts were passed for the protection of tenants, and the proviso to subsection (5) tends to the same end. The tenants were let into possession and, even if they had paid a premium, the Waites cannot turn round and turn them out, offering to pay back the money. It does not, strictly speaking, matter whether the payments were a premium within the Rent Acts or not. There is nothing in the Rent Acts which makes the agreement void: *Samrose Properties Ltd.* v. *Gibbard.*[24]

To sum up the defendants' contentions: it is submitted first that having regard to the provisions of section 70 (1) (*g*) of the Land Registration Act, 1925, whatever rights they had against the Waites on completion of the purchase, they had similar rights against the plaintiffs, who cannot be in a better position than the Waites. The object of section 27 (3) of the Land Registration Act is merely to give the chargee protection between the creation and registration of the charge. It does not give a legal estate to a chargee before registration, or override the rights of people in occupation before the execution of the charge. Secondly, on the facts the Waites would have been estopped as against the tenants from saying that the tenants were mere licensees. The tenants got equitable tenancies on December 30 when the Waites' purchase was completed, and legal tenancies (though that is not material) on registration by feeding the estoppel. There is nothing in the Rent Acts which would prevent this result. The court is not concerned with section 54 (2) of the Law of Property Act, 1925, because the question whether specific performance could have been obtained does not arise, since these tenants were in occupation. The only authority against that conclusion is Vaisey J.'s decision in *Hitchcock* v. *Waite*[25]: from the short report it is difficult to say what principle he applied.

Harold Christie Q.C. in reply. These defendants were never effective tenants of any kind. The position is substantially the same as in *Hughes* v. *Waite*.[26] After December 30 they were still trespassers and had no right to remain in occupation even as against the Waites. There is, of course, a distinction between an equitable and a legal tenancy. The Waites may have contracted to grant a tenancy, but that does not give the occupants an estate of any kind. Maybe, qua a person who has contracted to give the tenancy, an occupant has some right on the *Walsh* v. *Lonsdale*[27] principle, and if they were turned out, these defendants could by virtue of the Rent Acts, and also on the basis that the money was paid for a consideration which had wholly failed, sue for the return of the money they had paid. This, however, is not a contract which the court would order to be specifically performed. The rights of these defendants depend on whether at the time the Waites were in the position to give them anything. When the money was paid, the Waites had neither a legal nor an equitable interest. They could not have given the occupants any interest. In *Hughes* v. *Waite*[28] the charge was only executed and not registered before the so-called tenants went into possession. The lump sum payment in this case was a premium and it could not be both a premium and at the same time rent. There was nothing periodical about the payment, and in two of the cases the payment was not made in respect of the particular property ultimately occupied. The payments in those cases were not even described as rent. The Rent Acts do not protect the occupants, for they were not paying "rent."

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[22] *The Times*, May 30, 1957, p. 15; 169 E.G. 755.

[23] [1952] Ch. 840.

[24] [1958] 1 W.L.R. 235; [1958] 1 All E.R. 502.

[25] *The Times*, May 30, 1957, p. 15; 169 E.G. 755.

Sections 53 and 54 of the Law of Property Act, 1925, provide that no parol dealing of any kind shall do more than create an interest at will, which is exactly what was done here—subject only to the exception in the case of a tenancy for less than three years at the best rent without taking a fine. The exception does not apply here, for a fine was taken in each case. Further, Mrs. Hitchen's tenancy was certainly for more than three years. Her rent book contained receipts for 157 payments. None of the rent books is precisely accurate, which only shows the uncertainty of what was agreed.

The defendants have submitted that section 27 (3) of the Land Registration Act, 1925, does not create a legal interest in the plaintiffs prior to registration, but it is not clear why not. By virtue of section 37 (1) a person entitled to be registered as a proprietor may charge the land before being registered, and a charge by way of legal mortgage takes effect as a term of years absolute.

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[26] [1957] 1 W.L.R. 713.
[27] 21 Ch.D. 9.
[28] [1957] 1 W.L.R. 713.

Whether the plaintiffs had notice of the occupants' interests or not could not have affected them until January 9, because it was not until then that the Waites could have granted a tenancy of any kind. The plaintiffs knew that no one could get in before them. Section 27 is a qualification of section 26. Rule 81 provides that a charge shall not be registered until the estate out of which it is created is registered also, but by virtue of section 27 that does not prevent a charge from being effective. The charge took effect as from December 30 and it was, thereafter, impossible for the Waites to create any sort of interest which a mortgagor would be unable to create under his statutory powers. These tenancies were, therefore, only created after the charge had become effective and do not prevail against the mortgagee.

LORD EVERSHED M.R. In this case I have come to the conclusion, with all respect to the forceful arguments for the plaintiffs put to us by Mr. Christie, that Danckwerts J. rightly decided the matter as he did.

The case arose out of the somewhat nefarious transactions of three persons called Waite, also calling themselves (with what justification I know not) estate agents. They, taking advantage of the great demand for living accommodation, succeeded in extracting sums of money from persons whom they put into occupation of houses to which they, as often as not, at the material date, had no title whatever. They then acquired some title to the premises but subjected them to mortgages. In the result conflicts have arisen between two sets of persons equally innocent, namely, the mortgagees, who are no parties to the malpractices of the Waites, and the tenants, who were the victims of those malpractices.

In 1957 there came before Harman J. another such case under the name of *Hughes* v. *Waite*.[1] The general procedure followed that which I have very briefly described, but in *Hughes* v. *Waite* [1] the tenant did not in fact go into possession or occupation of any part of the premises until a date later than the date of the mortgage which the Waites executed of the property itself. In the present case that vital fact is otherwise. It is a feature of this case that the three tenants all went into occupation at a date before the Waites executed their mortgage in favour of the plaintiffs, and that circumstance has given rise to the somewhat special points which have been debated before us.

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[1] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

There are three defendants, and the facts in regard to them were found by the judge in the course of his very full and careful judgment. For simplicity I shall take the case of one of these tenants, namely, Mrs. Hitchen. She first came into contact with the Waites in the month of October, 1955. She then arranged with the Waites that she should get a tenancy of the top floor at 8, Church Rise, Lewisham. Mrs. Hitchen was called as a witness so as to be available for cross-examination upon her affidavit. The substance of the matter, as the judge found, was that a somewhat loose arrangement or bargain was made at that date that she should have a tenancy of this top floor flat as a weekly tenant at a weekly rent of £2 0s. 6d. which should be inclusive of rates. But it was an essential part of the bargain, and one upon which the Waites insisted as being essential to their machinations, that she should pay 156 weeks' rent in advance; and that she did. She was given a receipt which states upon the face of it that the Waites had received £315 18s., being 156 weeks' or three years' advance rent for the flat. The date in October which that receipt bears is one on which the Waites in fact had no interest in the premises 8, Church Rise, whatever; nor did Mrs. Hitchen then go into possession. But in the following month, on November 28, the Waites entered into a contract to purchase the whole house (including the top flat) from Colonel Sinclair for the sum of £2,300. The completion date was stated in the contract as December 19, but completion in fact took place on December 30.

In the meantime, however, a vital and important event occurred. On December 27, three days before completion, Mrs. Hitchen, who had been sent the key of the flat by post, went into occupation. On December 30 the contract for sale was completed, in the sense that a transfer of the property, which was registered property, was duly executed in favour of the Waites by Colonel Sinclair. On the same date, the Waites executed a mortgage by way of legal charge in favour of the plaintiffs for a sum of somewhat less than the purchase price. The registration, both of the transfer and the legal charge, occurred on January 9.

Let me repeat and emphasize the significance of the dates. First, there was the oral bargain under which the Waites promised to give Mrs. Hitchen the right of occupying the top flat at 8, Church Rise, as a weekly tenant at £2 0s. 6d. a week, provided

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she paid three years of that rent in advance. Next there was the contract by the Waites for the purchase of the property including the flat. Next Mrs. Hitchen, in pursuance of the arrangement with the Waites, went into possession, the Waites of course, at that time having under the contract an equitable right to the property subject to defeasance in the event of non-completion. Next, there was the completion on December 30, which had the effect of making the legal owner a trustee of the legal estate absolutely for the Waites; but, immediately afterwards, there was an effective charge in favour of the plaintiffs and, finally, the registration on January 9.

I need not refer to the other cases of Spurling and Neill, because, in essentials, the facts are the same and in neither case is there any fact more favourable to the plaintiffs than in the Hitchen case.

On those facts, as I have briefly stated them, Mr. Christie, for the plaintiffs, has argued that Mrs. Hitchen took no interest in the premises notwithstanding her occupation from December 27: first, because the bargain was incapable of being made effectively by parol, and further because, as he has contended, the sum paid of £315 18s. was not rent, and, accordingly, when she did go into possession, she could never say that she was there on the terms of payment of rent. She paid no rent thereafter, and, as I have said, according to that argument, she paid no rent at any time. Mr. Christie says that at best she had some kind of contract against the Waites but not such as was ever sufficient for, or could have been the subject of, a decree for specific performance. The result of that is, Mr. Christie says, that Mrs. Hitchen never acquired an effective right even against the Waites to remain in occupation, and, therefore, a fortiori, she never got any right whatever which was effective against the mortgagees for whom he appears.

He has argued two further points. First, he says that, whatever else may have been the position, whatever other might have been the situation, if this had not been registered land, the fact that it is registered land entitled the plaintiffs to rely upon section 27 (3) of the Land Registration Act, 1925, which, he argued, makes the legal charge granted to the plaintiffs effective from its own date, notwithstanding that it was not registered until January 9, and so, according to the terms of section 27 (3), would override any equitable or contractual or other interest which Mrs. Hitchen might have had.

Second and last, Mr. Christie has contended that, whether or no the sum of £315 18s. might be called rent for any purposes, it certainly amounted to a premium unlawfully required under the Rent Restriction legislation, that the Waites committed a criminal offence in demanding it, and that Mrs. Hitchen was particeps criminis in paying it and cannot, in the circumstances, rely upon the bargain which put her in occupation of which this illegal transaction was a part. Those were his contentions and Danckwerts J. rejected them.

In my judgment, the vital matter to determine in this case is what were the rights of Mrs. Hitchen, if any, as against the Waites when she went into possession, and, particularly, thereafter at the point of time on December 30 when the Waites' contract to purchase was completed. But since the illegality point, if I may so describe it, is in a sense fundamental to the whole issue, it is perhaps convenient to dispose of that first. If the truth is that the bargain was so tainted with illegality that Mrs. Hitchen cannot rely on it, that would be a conclusion of the whole matter. But, in my judgment, it clearly was not. The essential section is section 2 of the Landlord and Tenant (Rent Control) Act, 1949. By subsection (6) of section 2 it is enacted that "a person requiring any premium in contravention of this "section shall be liable on summary conviction to a fine" indicating, of course, that it is a criminal offence so to require. The fact that it is illegal to require rather than accept the payment was considered fully by this court in the case of *Woods* v. *Wise*.[2] In the course of that case, my brother Romer expressed the view that the payment of a sum by way of satisfaction and in advance of the rent was a premium within the Rent Restriction legislation. Birkett L.J. and I, the other members of the court, expressed no view on that matter, and I think in the present case it is equally unnecessary to express a view whether the £315 18s. was "a premium" within the Rent Acts; but if it was—and I am now assuming for the purposes of the argument that it was a premium—undoubtedly the Waites committed a criminal act in requiring the payment of £315 18s. as a condition of the grant of the rights of occupation which they promised. But, in my judgment, it does not follow that Mrs. Hitchen by paying it was so tainted with the criminality of the Waites as to disable her from setting up her bargain in any form at all. There have been suggestions that by paying such a premium a tenant might be tainted, and one such case is *Hitchcock* v. *Waite*[3] before Vaisey J., a case also concerned with the Waites. There is no authority with regard to the matter in this court, but there is a decision of Devlin J. in *Gray* v. *Southouse*,[4] which was cited to and relied upon by Danckwerts J. for the view that a tenant, who had been prevailed upon to submit to a demand for payment of rent in advance, ought not to be treated as disabled from having any rights under the contract for that reason. I agree with that view and I think also that the proviso to subsection (5) of section 2 of the Landlord and Tenant (Rent Control) Act, 1949, would strongly support the same view. The proviso relates to the case of a demand of a premium made after March 25, 1949, but before the commencement of the Act of 1949—during a period, therefore, when to demand it would, apart from the Act of 1949 have been perfectly lawful. The Act of 1949 in this respect takes effect as regards all agreements made after March 25 subject to the proviso. Therefore, without the proviso, the result might be that a bargain, at the time it was entered into being perfectly lawful, would result in rights against the landlord which arose exclusively out of the later legislation. It was therefore thought obviously proper that such an agreement—that is an agreement made since March 25 but before the commencement of the Act of 1949—should be voidable at the suit of either party. This court has held that it is only voidable when it is executory. If the premium has already been paid, then neither the landlord nor the tenant can rely upon the proviso and say that the executed agreement is voidable. But if the argument as to illegality is right, that is, if a landlord who demanded a premium after the coming into operation of the Act of 1949 (when he could not deny that it was quite illegal) should be able to turn round and deny to the tenant his rights which the contract purported to give him, then it seems to me to lead to a very strange result, for he would be in a stronger position than the innocent landlord who had made his bargain at a time when it was not illegal to do so. Therefore, I reject, as did the judge, the proposition that Mrs. Hitchen is debarred by participating in a criminal act from asserting any right she may have under her contract of tenancy.

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[2] [1955] 2 Q.B. 29; [1955] 1 All E.R. 767.

I have referred for the purposes of the Rent Act of 1949 to the effect of the payment of this sum of £315 18s.; but Mr. Christie has contended that for the purposes of the Law of Property Act, 1925, and the general law, the £315 18s. equally lost all the characteristics of rent and was a mere premium. He relied upon *Braythwayte* v. *Hitchcock*[5] as showing that Mrs. Hitchen, though she went into occupation, had no rights against the landlord because no rent was paid by her. Parke B. in that case said[5]: "Although the law is clearly settled, that where there "has been an agreement for a lease, and an occupation without "payment of rent, the occupier is a mere tenant at will; yet it "has been held that if he subsequently pays rent under that "agreement, he thereby becomes tenant from year to year." So it is contended that, according to the ordinary law, Mrs. Hitchen never got any better right than a pure licensee or a tenant at will. I am unable to agree with that view, nor do I think that Parke B.'s statement leads to that result. He was dealing only with a case where one, having made an agreement providing for the payment of rent, has gone into possession but has failed to pay at the relevant date any rent at all. It seems to me that, on the facts of this case, when Mrs. Hitchen went in she must be treated as having paid the rent for a period; and the terms of the receipt clearly support that view. So, when I come to look at the section of the Law of Property Act, 1925, which is relied upon, I am far from saying that (in so far as section 54 (2) might otherwise apply) this is a case in which all that happened was that there had been a sum of money taken but no rent paid. In this respect the case may be reasonably said to be likened to that of *Green* v. *Rheinberg*.[6] In that case there had been a lease executed in favour of a lessee which, on the face of it, showed that the rent was payable periodically in the ordinary way, but by collateral arrangement the landlord had taken a lump sum in satisfaction of the rent over a period of years. Unfortunately for him, the mortgagee there had notice of the counterpart lease which he had seen but had omitted to make any further inquiry and assumed that the parties were regulating their conduct according to its terms, and the mortgagee was held to be bound by the rights which the lessee had as against his landlord, not according to the terms of the counterpart of the lease but according to the facts which were that he had paid the rent in advance and therefore no further rent was payable until the period had elapsed. It will be observed that the lessee was not in that case disentitled to his rights because he had so paid his rent in advance. So in this case it would appear to me that Mrs. Hitchen, when she was let into possession, could say: "I am a weekly tenant at £2 0s. 6d.

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[3] *The Times*, May 30, 1957, p. 15; 169 E.G. 755.

[4] [1949] 2 All E.R. 1019.

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[5] (1842) 10 M. & W. 494, 497.

[6] (1911) 104 L.T. 149.

"and I have paid a sum which the landlord has accepted in "satisfaction of my obligation to pay rent for a period of three "years." In fact the period was 156 weeks which, if it is relevant, is slightly less (by four days) than three years. It seems to me also right to say (if it be necessary) that her rights, if they are in other respects available to her, would be limited to three years' occupation and would not involve, as was the result in one of the other cases, a promise of occupation for three years plus one week.

I come now to consider what her rights were against the Waites. She was and is entitled, as against them, to say, under the provisions of section 55 of the Law of Property Act, 1925, that she acquired "an interest in land by virtue of taking possession." She had gone into possession and she was there under the terms of the agreement; and it seems to me, as this court has laid down, that there was a moment of time on December 30 when the Waites were absolute beneficial owners of the property and therefore would be estopped as against her from denying her rights as their tenant to remain in occupation for the period for which she had paid rent. Whether that interest was an interest which equity would specifically enforce, or whether it was a mere contractual right, seems to be irrelevant. Mrs. Hitchen having gone into occupation and acquired that right against the Waites, they could not and would not have been allowed by the court to assert against Mrs. Hitchen that they could evict her.

But that still leaves the question: Are the plaintiffs, the mortgagees, in any different position? That brings me to a point which has been much pressed upon us arising under the Land Registration Act, 1925, to which I have already briefly referred. The argument depends upon the true interpretation of section 27 (3). I should mention earlier sections. By section 19 (1) it is provided that transfers of registered estates in land shall be completed by the registrar "entering on the "register the transferee as the proprietor of the estate trans-"ferred, but until such entry is made the transferor shall be "deemed to remain proprietor of the registered estate." Subsection (2) provides: "All interests transferred or created by "dispositions by the proprietor, other than a transfer of the "registered estate in the land, or part thereof, shall, subject to "the provision relating to mortgages, be completed by registra-"tion in the same manner and with the same effect as provided "by this Act with respect to transfers of registered estates" and so on. Then section 20 (1) provides: " In the case of a free- " hold estate registered with an absolute title, a disposition of " the registered land, or of a legal estate therein, including a lease " thereof, for valuable consideration shall, when registered, con- " fer on the transferee or grantee an estate in fee simple . . . or " other legal estate expressed to be created in the land dealt " with "—I am only reading the relevant terms—" together with " all rights," etc., but " subject (*b*) . . . to the overriding interests, " if any, affecting the estate transferred or created, but free from " all other estates and interests whatsoever." Reference must also be made to section 26 in relation to charges, but I need only point out that by that section charges by way of legal mortgage shall be completed by the registrar entering on the register the person in whose favour the charge is made. Apart from section 27 (3), it would appear therefore to be tolerably clear that the title of the purchaser or of the mortgagee, as the case may be, in the case of registered land is not perfected until registration, and that, when registration takes effect, it is subject to overriding interests which are anticipated by section 20, but more precisely defined by section 70.

Section 70 (1) provides: " All registered land shall . . . be " deemed to be subject to such of the following overriding " interests as may be for the time being subsisting in reference " thereto." Then paragraph (*g*) covers the case of the right of every person in actual occupation of land " save where inquiry is " made of such person and the rights are not disclosed." Apart from section 27 (3) I agree with the way in which Mr. Cross put it, that the effect of paragraph (*g*) is to make the case of registered land analogous to the case of non-registered land, and to apply to the former the same kind of principle as is found in *Hunt* v. *Luck* [7] and exemplified in *Green* v. *Rheinberg*.[8]

Turning to section 27, it is to be observed that the section is directed, at any rate at first sight, to procedure and form. In the first subsection it is provided that " A registered charge " shall, unless made or taking effect by demise or subdemise," etc., " take effect as a charge by way of legal mortgage." Then subsection (2) provides: " Subject to the provisions of the Law " of Property Act, 1925, a registered charge may contain in the " case of freehold land, an express demise, and in the case of " leasehold land an express subdemise of the land to the creditor

[7] [1902] 1 Ch. 428; 18 T.L.R. 265.

[8] 104 L.T. 149.

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Grace Rymer Investments Ltd. v. Waite.

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"for a term of years absolute, subject to a proviso for cesser on "redemption." Subsection (3) provides: "Any such demise or "subdemise or charge by way of legal mortgage shall take effect "from the date of the delivery of the deed containing the same, "but subject to the estate or interest of any person (other than "the proprietor of the land) whose estate or interest (whenever "created) is registered or noted on the register before the date "of registration of the charge."

The argument, as I follow it, appears to be: (1) that the time from which the mortgage shall take full effect must be treated as being the moment of the execution of the legal charge, which would put the legal estate in the chargee from that date; and (2) that the legal estate overrides all interests save those of persons whose estates or interests are registered or noted on the register. It seems to me that that cannot be right. If so, it would be inconsistent, so far as I can see, with the purpose and intention of the earlier sections to which I have already alluded, and which provide that until registration (in the case of a sale) the vendor remains the proprietor of the legal estate. I am unable to accept it that if the registered proprietor is to be treated as remaining the proprietor of the legal estate, a legal estate at the same time can also be created in favour of somebody else not on the register at all and not deriving title from someone on the register, although the earlier sections 19, 20 and 26 indicate that a charge is only completed by entry on the register.

The words "shall take effect" would be a very inept and oblique way of providing for the creation, retrospectively, of some legal interest. After all, the words "shall take effect" are found in the first subsection which says "A registered charge "shall . . . take effect as a charge by way of legal mortgage."

In my judgment, Danckwerts J. was right in the view he formed that the purpose of this provision is to negative the suggestion that, pending registration, the charge is wholly ineffective, because otherwise, being only by the terms of the earlier sections capable of being completed by registration, it might never be effective at all, since at its date ex concessis the person granting the legal charge might not himself be on the register. The section, indeed, is a new section not re-enacted from any earlier statute. As the judge pointed out, the argument was a novel one not previously taken, and he did not think it was sound.[9] "I do

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[9] Ante, 314, 322.

"not think that the subsection is dealing with the matter of legal "estates or interests, but the form of a registered charge and is "simply designed to secure that the demise or subdemise (or the "equivalent rights in the case of a charge by way of legal mortgage) begin from the date when the charge is executed." Then he goes on to say: "In any case, the tenancies of the defendants "in possession began prior to the date of the execution of the "charge and so would, if not invalid, be effective against the "plaintiff company under section 20 (1) of the Act." I agree also with that. It would seem to me that it would be contrary to the whole tenor of the Act and indeed to general principle if, by reason of the reference in section 27 to estates or interests which are registered or noted on the register, you could produce the result that the plaintiffs could defeat the interests of a tenant of which they had notice when he took possession. According to general principles (and indeed it has not been contested) the plaintiffs had or must be treated as having had notice of the occupation of Mrs. Hitchen and her companions since there they were in occupation for all to see.

In the result the position of the plaintiffs can be no better than the position of the Waites as against the tenants. I further concur with the judge in the view that the tenants had, as against the Waites at the relevant date, a right founded in contract, and that that was an interest in land which they were able to assert against the Waites and which entitled them to remain in occupation during the period in respect of which they had paid the stipulated rent in advance. I should say (and I meant to say in dealing with the Waites) that it is not in doubt that the £2 0s. 6d. was in truth the standard rent under the Rent Act and therefore the maximum charge by way of rent which they could make and there is here no discount of the rent by the payment in advance. I have stated that the £315 18s. represents in fact 156 weekly payments. As against the tenants the Waites would have been estopped from saying that they were mere licensees, and, therefore, I think the same conclusion affects the plaintiffs. That result, in my opinion, is neither affected by the terms of the Land Registration Act, 1925, nor by any alleged illegality under the Rent Act of 1949.

As a consequence the judge rightly concluded the matter and this appeal should be dismissed.

ROMER L.J. I am in full agreement with the judgment which the Master of the Rolls has delivered and I do not desire to add anything of my own.

ORMEROD L.J. I also agree.

Appeal dismissed.

Solicitors: *A. Kramer & Co.; Humphrey Razzall & Co.*

B. A. B.

1958
April 15, 16.

Upjohn J.

In re TRIFFITT'S SETTLEMENT.
HALL *v.* HYDE.

[1958 H. No. 15.]

Power of Appointment — Hybrid power — Delegation — Power neither special nor general—Power to appoint with consent of trustees and to any person or persons with two named exceptions—Whether capable of delegation.

A marriage settlement made by the plaintiff on July 8, 1953, contained in clause 3 (1) thereof a power of appointment in these terms: "Upon trust for such person or persons other than and "except T. and any wife of his and in such manner generally as "the wife [the plaintiff] shall from time to time or at any time by "deed revocable or irrevocable with the consent in writing of the "trustees for the time being hereof . . . which consent such trustees "may withhold or give at their absolute discretion without being "in any way liable for the exercise of such discretion appoint."

The plaintiff, who was now 42, had had no issue and desired to exercise the power by execution of a deed settling certain shares in the marriage settlement of 1953: "Upon trust for . . . [certain "defined classes of] beneficiaries or any one or more of them "exclusive of the other or others in such shares and proportions "and subject to such terms limitations and provisions as the "trustees shall from time to time without offending the rule against "perpetuities by deed or deeds revocable or irrevocable execute "before the vesting day." The vesting day was defined in the deed as a day to expire at the end of 21 years from the date of the marriage settlement; the trustees were not the same body as the trustees of the marriage settlement.

The plaintiff asked for a declaration that on the true construction of clause 3 (1) she was (subject to the consent of the trustees) entitled to execute the deed. It was not in dispute that the power in clause 3 (1) was a hybrid power, i.e., having some attributes of a general power and some attributes of a special power:—

Held, (1) that although the trust was expressly only "for such "person or persons," it was to be implied that it was to include any trust for such purposes as the plaintiff might appoint.

In re Dilke [1921] 1 Ch. 34; 37 T.L.R. 13 and *In re Harvey* [1950] W.N. 112; 66 T.L.R. (Pt. 1) 609; [1950] 1 All E.R. 491 applied.

(2) That the trustees could, if they so desired, consent to an appointment in the widest possible terms, and were not under any duty regarding the selection of the objects of the power.

In re Dilke (supra) and *In re Phillips* [1931] 1 Ch. 347 applied.

(3) That although the words "in such manner generally as the "wife . . . shall . . . appoint" did not confer any power to delegate her discretion, in a widely drawn power such as this it was to be implied that the plaintiff could delegate the discretionary powers entirely.

(4) That this was not a fiduciary power, but a beneficial power conferred by the plaintiff on herself for her own benefit, and she could (with the consent of the trustees) appoint to any person or persons whom she liked outside the two excluded persons. She was accordingly, entitled to execute the proposed deed.

ADJOURNED SUMMONS.

The plaintiff, Mrs. Nancy Eileen Hall (then Triffitt) on July 8, 1953, executed a marriage settlement; the parties to the deed were the plaintiff (therein referred to as "the wife") of the first part; her husband, James Edward Hall (therein referred to as "the husband") of the second part, her father, William Triffitt (therein referred to as "Mr. Triffitt") of the third part and the three trustees of the fourth part.

The plaintiff settled certain shares which included 12,000 ordinary shares of £1 each in Cooper, Triffitt & Co. Ltd.; those were now represented by some 60,000 shares in that company. Her father settled 6,000 ordinary shares in Cooper, Triffitt & Co. Ltd., which were now represented by some 30,000 shares in the company, making a total now of 90,000 shares in Cooper, Triffitt & Co. Ltd. It was in respect of those shares that the plaintiff desired to exercise the power of appointment contained in the settlement.

Clause 3 of the settlement was in these terms: "The trustees "shall stand possessed of the said investments mentioned in the "First and Second Schedules hereto respectively and the investments for the time being representing the same (hereinafter "called 'the trust fund') and of the annual income thereof upon "the trusts and subject to the powers and provisions following "(that is to say) (1) As to the whole of the trust fund and the "annual income thereof or any part or parts thereof respectively

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TRIFFITT'S SETTLEMENT, *In re.*

" upon trust for such person or persons other than and except " Mr. Triffitt [the plaintiff's father] and any wife of his and in " such manner generally as the wife [the plaintiff] shall from " time to time or at any time by deed revocable or irrevocable with " the consent in writing of the trustees for the time being hereof " not being less than two in number which consent such trustees " may withhold or give at their absolute discretion without being " in any way liable for the exercise of such discretion appoint. " (2) And in default of and until and subject to any such appointment upon trust to pay the annual income of the trust fund to " the wife during her life." There followed in sub-clause (3) a power to appoint amongst the children or remoter issue of the marriage in a wide manner which included express authority to delegate the exercise of the discretion to other persons, with the usual trusts for the children in default of appointment. Clause 7 empowered the plaintiff " with the consent in writing of the " trustees " in the same terms as in clause 3 (1) to appoint " to " or in favour of the husband but only in case he survives her " during the residue of his life or any less period all or any part " of the annual income of the trust fund . . ."

The marriage of the plaintiff and her husband took place on July 23, 1953. She was now some 42 years old and so far there had been no issue of the marriage. She was now anxious to exercise the power by a deed, a draft of which was in evidence before the court. The plaintiff was the party of the first part: the trustees of the marriage settlement, referred to as " the settlement trustees," were parties of the second part and the parties of the third part were four trustees called the resettlement trustees. Of those four trustees three were different from the marriage settlement trustees, but there was one trustee common to both settlements.

The deed, after reciting the settlements, defined the trust fund as 90,000 shares in Cooper, Triffitt & Co. Ltd. The deed then defined certain classes of beneficiaries: the primary beneficiaries, who were the children or adopted children of the plaintiff who might be born or adopted before the vesting day; the secondary beneficiaries were certain nephews of the plaintiff and their issue born or adopted and the respective spouses and widows of such persons existing before the vesting day. The vesting day was defined as a day to expire at the end of 21 years from the date of the marriage settlement. Then the proposed settlement proceeded to settle these shares and investments for the time being representing the same " Upon trust for the primary and secondary "beneficiaries or any one or more of them exclusive of the other "or others in such shares and proportions and subject to such "terms limitations and provisions as the trustees shall from time "to time without offending the rule against perpetuities by deed "or deeds revocable or irrevocable execute before the vesting "day." There were a number of other trusts, and an ultimate trust in favour of the Royal College of Surgeons.

The plaintiff by this summons asked: (1) Whether upon the true construction of clause 3 (1) of the marriage settlement the plaintiff was entitled (subject to the consent in writing of the trustees of such settlement) to delegate the power of appointment therein contained so as when exercising the same to appoint and direct that the funds thereby dealt with should be held upon discretionary trusts or subject to discretionary powers exercisable by the trustees thereof. (2) In particular whether upon the true construction of the said clause the plaintiff was entitled (subject to such consent as aforesaid) validly to execute a deed of appointment in the terms of the draft which was intended to be exhibited to an affidavit.

R. W. Goff Q.C. and *A. C. Sparrow* for the plaintiff. The general rule is that a power involving the exercise of a personal discretion by the donee cannot be delegated: delegatus non potest delegare (see Farwell on Powers, 3rd ed., p. 499), although that rule might not be infringed by an appointment including a power of advancement: *In re Morris's Settlement Trusts.*[1]

In the present case the principle delegatus non potest delegare does not apply and the delegation proposed by the plaintiff comes within the terms of the power: *In re Joicey.*[2] This submission is based on the following grounds: This is not, properly speaking, a special or a general power at all; it is a "hybrid" power, neither general nor special. It more nearly approximates to a general power. This intermediate class of power was recognized in Jarman on Wills, 7th ed., vol. 2, p. 763, and was approved by Vaisey J. in *In re Jones*[3]; see also *In re Harvey.*[4] This is not a power involving the exercise of a personal discretion; it is, subject to two qualifications, an absolute power to deal with the property as the plaintiff thinks fit.

The terms of the power refer only to "such person or persons" as the plaintiff may appoint, and make no reference to any appointment for "such purposes" as she may think fit, but that omission makes no difference and those words will be implied: *In re Dilke*[5] and *In re Harvey*.[6]

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[1] [1951] W.N. 412; [1951] 2 All E.R. 528.

[2] [1915] 2 Ch. 115.

[3] [1945] Ch. 105; 61 T.L.R. 120.

[4] [1950] W.N. 112; 66 T.L.R. (Pt. 1) 609; [1950] 1 All E.R. 491.

The consent of the trustees is required, not to the particular appointment but merely to the exercise of the power, to give it validity. The requirement of a consent of that character is not of itself sufficient to prevent a power being a general power: *In re Dilke*[7] and *In re Phillips*.[8] It was held in *In re Dilke*[9] that where a general power was exercisable "with the consent and concur-"rence" of trustees, their consent was necessary to give the appointment validity but not for the selection of objects by the donee. That case was followed in *In re Phillips*.[10]

Those cases were distinguished in *In re Watts*,[11] which was a forerunner of *In re Churston Settled Estates*,[12] but on grounds which Roxburgh J. in the *Churston* case[12] said were wrong. A clause in the settlement in *In re Watts*[13] empowered the settlor to revoke trusts during the life of her mother and to appoint new trusts with the consent of her mother; that was held to be a special power not amounting to ownership. In the *Churston* case[14] the question was whether the power was a special or general power amounting to absolute ownership in order to see whether it infringed the perpetuity rule. It is not relevant on the question of delegation, and neither *In re Watts*[15] nor *Churston*[16] touch this case.

The cases under the Wills Act, 1837, where it was considered whether powers were general or special are also distinguishable, since they do not concern delegation of a power. Before *Phillips* v. *Cayley*[17] there had been some conflict between the authorities; in that case it was held that a power to be exercised by "a will "or codicil expressly referring to the power" was, notwithstanding section 27 of the Wills Act, 1837, not exercised by a general bequest not referring to the power. In *In re Byron's Settlement*[18] a power was exercisable for the benefit of such persons, not being her present husband, as the donee should by deed or will appoint; that was held not to be a power to appoint in any manner she might think fit and was not a general power within the meaning of section 27. On the other hand, a power of this kind was held for the purposes of the Legacy Duty Act, 1796, to be a general and absolute power (*Platt* v. *Routh* [19]), although it is fair to say that the Act of 1796 did not contemplate a hybrid class of power at all.

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[5] [1921] 1 Ch. 34; 37 T.L.R. 13.
[6] 66 T.L.R. (Pt. 1) 609.
[7] [1921] 1 Ch. 34.
[8] [1931] 1 Ch. 347.
[9] [1921] 1 Ch. 34.
[10] [1931] 1 Ch. 347.
[11] [1931] 2 Ch. 302.
[12] [1954] Ch. 334; [1954] 1 All E.R. 725.
[13] [1931] 2 Ch. 302.
[14] [1954] Ch. 334.
[15] [1931] 2 Ch. 302.
[16] [1954] Ch. 334.
[17] (1889) 43 Ch.D. 222.
[18] [1891] 3 Ch. 474.

The question of delegation is one of construction as to what is authorized by the donor of the power. The plaintiff was herself the settlor of the funds which it is now sought to appoint, and she has reserved to herself this wide overriding power; it would be extremely odd if she had made a provision that she could not delegate this power. It is clearly wide enough to authorize the plaintiff to appoint to herself, which is important when considering whether she can delegate: *In re Penrose*.[20] It was held in *In re Mackenzie* [21] that an appointment under which the appointed property was transferred to new trustees was, on the terms of the power, invalid as to the transfer to new trustees but not as to the objects appointed.

To sum up, this is plainly a hybrid power, and once it is established as being in that class the question is whether that power is nearer to a general or special power for the purpose of delegation. In *In re Harvey* [22] a power similar to the present one was held to be neither special nor general, and as the persons excepted did not and could not exist, the power could be treated for all purposes as a general power.

If on the construction of the power the trustees have a duty which they cannot delegate, that does not mean that the plaintiff cannot delegate; there is nothing in this power to prevent delegation. Reliance is placed on the fact that this is not a fiduciary power and the plaintiff could appoint to herself: *In re Harvey*.[23]

Delegation is a question of intention, and if this were an ordinary general power it could be delegated; it would be strange if there were any other intention on the part of the plaintiff who was herself the settlor. The only two distinctions from a general power are: (1) the consent of the trustees for its exercise, and (2) the exclusion of two persons from the objects, but for present purposes those are irrelevant and this power approximates to a general power for the purpose of delegation.

M. J. H. Fairbairn for the defendants, trustees of the settlement and the plaintiff's husband James Edward Hall. [No argument was submitted for the plaintiff's husband, as he was prepared to agree to the proposed appointment, but as there were unascertained beneficiaries an argument was submitted for the trustees against the proposed resettlement.] Delegation is only justifiable in two cases: (1) where there is express authority in the instrument creating the power, and (2) where the power is an absolute general power wholly unqualified: see Farwell on Powers, 3rd ed., p. 498. A power which is merely ministerial and involves no personal discretion can be delegated: Halsbury's Laws of England, 2nd ed., vol. 25, p. 526. Thus in *White* v. *Wilson* [24] it was not contended that the donee of an absolute general power could not delegate; in contrast to that case, in *Ingram* v. *Ingram* [25] Lord Hardwicke held that a special power could not be delegated. So far as delegation is concerned, it is not whether the power is general or special but whether it amounts to absolute ownership or involves the exercise of a discretion by the donee; in the former case it can be delegated, in the latter it cannot be delegated. It is accepted that the power in this case is a hybrid power, but there is no authority in which it has been held that a power not amounting to an absolute ownership could be delegated. *In re Morris's Settlement Trusts* [26] is authority for the proposition that delegation can be expressly authorized; in that case Jenkins L.J. said that he could not regard the words "in such manner in all respects" in the provision conferring the power as an authorization to delegate in the way which had been attempted.

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[19] (1841) 3 Beav. 257.

[20] [1933] 1 Ch. 793; 49 T.L.R. 285.

[21] [1916] 1 Ch. 125.

[22] 66 T.L.R. (Pt. 1) 609.

[23] Ibid.

On construction of the settlement, there is no express authorization to delegate in clause 3 (1); on the other hand, clause 3 (3) expressly authorizes delegation. The power conferred by clause 3 (1) is among a limited class, limited so far as the donee is concerned by the exclusion of two persons, and by virtue of that limitation it is only a power of selection, which involves in some degree the exercise of the donee's discretion, and, in the absence of an express power to delegate, this power cannot be delegated: *In re Byron's Settlement.*[27]

It would be a fraud on the power for an appointment to be made to Mr. Triffitt or his wife; it would also be a fraud to make an appointment indirectly benefiting them.

[UPJOHN J. Apart from an appointment to Mr. Triffitt and his wife, can you think of any other case where it would be a fraud on the power?]

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[24] (1852) 1 Dr. 298.

[25] (1740) 2 Atk. 88.

[26] [1951] 2 All E.R. 528.

[27] [1891] 3 Ch. 474.

Appointment to any person knowing that he would hand over the money to Mr. Triffitt or his wife would be a fraud: see *In re Greaves.*[28]

Although the terms of the power are so wide that the plaintiff can appoint to herself, the trustees are perfectly entitled to consider the terms of each appointment. The trustees' consent is not merely a technical consent to the exercise of the power; on its true construction it is a consent to the selection of objects and is not merely necessary to make the appointment valid. Reliance is placed on the words in the power, "which consent "such trustees may withhold or give at their absolute discretion "without being in any way liable" therefor. Special emphasis is given by those words to the consent of the trustees, and they must satisfy themselves as to the objects appointed. The whole tenor of the case is different from *In re Dilke* [29] and *In re Phillips.*[30] It may be true that they themselves have no power of selection of objects, but they are bound to give some consideration to such selection: as to the duties of trustees, see *Eland* v. *Baker.*[31]

The plaintiff's power is so fettered by the necessity for the trustees' consent that this is not in any sense tantamount to absolute ownership, and accordingly it cannot be delegated.

It was argued that for the purposes of delegation the question was whether this was nearer to a general or a special power. That is not altogether accepted; although Farwell makes a distinction between general and special powers, it is not made for the purpose of delegation, for which there has to be absolute ownership or express authorization; there is neither here, and therefore this power cannot be delegated.

Goff Q.C. in reply. In considering the passage in Farwell it must be realized that that was written in 1916 and was taken from the first edition, which was long before the development of the law as to hybrid powers. In the first edition it was stated that a power to appoint to whom the donee pleased except A was a general power (p. 7).

Consent alone cannot, on the authorities, go to the question of delegation. With regard to the exclusion of individuals, *In re Harvey* [32] is relied on. The necessity for the trustees' consent does not mean that the power cannot be delegated, and the question is, once the trustees give their consent, what is the ambit of the power? It is not suggested that there is an express power of delegation except in so far as it is inherent in the instrument itself and by analogy with a general power. The exclusion of certain persons as objects here was for reasons quite obvious and not for excluding delegation; the words in *In re Byron's Settlement*[33] should not be given too much weight out of their context.

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[28] [1954] Ch. 434; [1954] 1 All E.R. 771.

[29] [1921] 1 Ch. 34.

[30] [1931] 1 Ch. 347.

[31] (1861) 29 Beav. 137.

[32] 66 T.L.R. (Pt. 1) 609.

Upjohn J. This summons raises an interesting question which may be shortly stated thus. Under a settlement the plaintiff was given a wide power of appointment fettered, however, in this way, that there are two named persons to whom she cannot make an appointment, and any appointment can only be made with the consent of the trustees of the settlement. The plaintiff is anxious to exercise that power of appointment in a way which involves a transfer of property to a new body of trustees and confers upon those trustees wide discretionary powers. The question is whether such an exercise of the power of appointment is within the terms conferred upon her or not.

[His Lordship stated the facts and continued:] The whole question is whether it is proper to confer upon the new trustees the discretion to which I have referred. The trustees of the marriage settlement, who are the first three defendants, have intimated that they will consent to the proposed appointment provided, of course, that it is a proper and valid appointment within the terms of clause 3 (1) of the marriage settlement.

Mr. Goff, for the plaintiff, concedes at once that the power of appointment contained in clause 3 (1) is not a general power of appointment, using that phrase in its widest sense: that is to say, a power to appoint amongst the whole world unfettered by any consent. Equally, of course, it is not the usual limited power of appointment where there is a limited class to whom the donee of the power can make the appointment.

Counsel on both sides agree that it is really a hybrid power: it has some of the attributes of a general power and some of the attributes of a special power. The validity of such a power is not in dispute, and has been established in such cases as *In re Park*,[1] *In re Jones*[2] and *In re Harvey*.[3]

I have been referred, quite properly, to a considerable number of authorities. It is not in dispute, although I do not have to decide the question, that, for the purposes of the rule against perpetuities, a power such as I have read must be treated as a special or limited power. That seems to be the effect of *In re Watts*[4] and *In re Churston Settled Estates.*[5] Equally, for the purposes of section 27 of the Wills Act, 1837, the power would also seem to have the character of a limited power: see *Phillips* v. *Cayley*[6] and *In re Byron's Settlement.*[7] On the other hand, under the now obsolete Legacy Duty Act, 1796, it would seem that a power in these terms has the character of a general power: see *Platt* v. *Routh.*[8] But, as I have said, I am not concerned with those questions, and I do not decide them.

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[33] [1891] 3 Ch. 474.

[1] [1932] 1 Ch. 580.

[2] [1945] Ch. 105; 61 T.L.R. 120.

[3] [1950] W.N. 112; 66 T.L.R. (Pt. 1) 609; [1950] 1 All E.R. 491.

I have to consider whether there is a power in the plaintiff to delegate the exercise of discretionary powers to others. In my judgment, that is essentially a question of construction of the marriage settlement. The donee of the power can delegate the exercise of discretionary powers to others in two cases: First, where there is a completely general power in its widest sense, that is tantamount to ownership, and, therefore, the donee of the power can exercise it in whatever way he pleases. That is not this case for the reasons which I have already mentioned. In the first place, there are two persons in this world who are excluded from being the objects of the appointment, and, secondly, the appointment can only be made with the consent of the trustees. Mr. Goff very properly concedes that this power cannot be treated as tantamount to ownership. Secondly, the donee may delegate discretionary powers where, as a matter of construction, some power can be spelt out enabling the donee of the power to delegate his discretion. That, of course, is frequently done in the case of special powers, and, as I have already said, it was in fact done by clause 3 (3) of this very marriage settlement. In all other cases the principle "delegatus non potest delegare" applies.

Mr. Fairbairn, for the trustees, submits that properly regarded the power conferred by clause 3 (1) is a power of selection among a limited class, limited perhaps somewhat indefinitely, but, nevertheless, effectively, because there are two people in this world who cannot be included under the power of appointment as objects of an appointment. He referred me to *In re Byron's Settlement,*[9] where Kekewich J. considered the matter. It was in fact a decision on the Wills Act, 1837, but the following observations seem to me of general application [10]: "Thus regarded, one understands without difficulty the intention and meaning of the words, 'which he may have power to appoint in any manner he may think proper.' Anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship. A man is not any more the proprietor of land or money if he has power to appoint to all the world except to the children of A. than he is if he has power to appoint to the children of B. It is, in either case, a power of selection, not ownership; the appointor cannot deal with the property as he pleases." Mr. Fairbairn submitted that that general principle applies and that there is here a power of selection with no express power to delegate the discretion.

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[4] [1931] 2 Ch. 302.

[5] [1954] Ch. 334; [1954] 1 All E.R. 725.

[6] (1889) 43 Ch.D. 222; 6 T.L.R. 128.

[7] [1891] 3 Ch. 474.

[8] (1841) 3 Beav. 257.

[9] [1891] 3 Ch. 474, 479.

There are one or two general observations to be made before I consider the actual terms of the power. The first is that the trust is for such person or persons as may be appointed, and it does not include expressly any trust *for such purposes* as the plaintiff may appoint. It is clear from *In re Dilke* [11] and from *In re Harvey* [12] that those words are readily to be implied in a power such as this. Secondly, that in an ordinary limited power, such as a power to appoint to a class of issue, it is settled that the words "in such manner," namely, as the wife shall appoint, do not confer any power to delegate a discretion. That appears from the recent case of *In re Morris's Settlement Trusts* [13]: but that was a case of an ordinary limited power of appointment.

The next question is this: what is the duty of the trustees in giving consent? Mr. Goff submits the matter is covered by the authority of *In re Dilke* [14] and the later authority of *In re Phillips*,[15] a decision of Maugham J. Those authorities seem to establish that the trustees may, quite properly, if they so desire, consent to an appointment in wide terms and are not under any duty as regards the selection of the objects of the power. Maugham J., in *In re Phillips*,[16] after referring to the *Dilke* case,[17] put the matter in this way [18]: "Stated in other language, their consent was required to the appointment to give validity and effect to the appointment, but there was no reason for holding that they had any duty as regards the selection of the

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[10] [1891] 3 Ch. 474, 479.

[11] [1921] 1 Ch. 34; 37 T.L.R. 13.

[12] [1950] 1 All E.R. 491.

[13] [1951] W.N. 412; [1951] 2 All E.R. 528.

[14] [1921] 1 Ch. 34.

[15] [1931] 1 Ch. 347.

[16] Ibid.

[17] [1921] 1 Ch. 34.

[18] [1931] 1 Ch. 347, 355.

"objects of the power." Mr. Fairbairn has submitted that that does not apply here because of the wording at the end of the clause; they are in fact under a duty to consider the selection of the objects of any appointment. The words he relied upon are "which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise "of such discretion." I am not able to accept that argument. In my judgment, the matter is covered by the two authorities I have mentioned and, therefore, the trustees properly could (only, of course, if they are so minded) give their consent to an appointment in the widest possible terms. For instance, they could—and this would be closely analogous to the actual facts in *In re Dilke* [19] —give their consent to an appointment by the plaintiff if they thought fit which gave her a general power of appointment in the widest sense. It is quite clear they could, if they were so minded, quite properly consent to an appointment by the plaintiff in favour of herself. They could quite properly, if they were so minded, consent to an appointment to a charitable organization such as the Royal College of Surgeons.

One other matter has been argued before me which I must consider. It was submitted by Mr. Fairbairn that the power conferred upon the plaintiff is in fact a fiduciary power. The ambit of a fiduciary power has recently been considered in the Court of Appeal in *In re Greaves*.[20] That case in fact related to a release of powers, but the Master of the Rolls made some useful observations on this question of fiduciary power and what constitutes a fraud upon it. He quoted with approval the language of Chitty J. in *In re Somes* [21, 22]: "'There is no duty "'imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the "'objects of the power beyond this, that if he does exercise the "'power of appointment, he must exercise it honestly for the "'benefit of an object or the objects of the power, and not "'corruptly for his own personal benefit . . .'" Then he considers the release of the powers.

That language cannot be made to fit this power. The plaintiff can appoint to anyone in the world (including herself) except the two persons named, for any purpose, providing that she could obtain the consent of the trustees. This is not a fiduciary power at all but a power conferred by the plaintiff on herself for her own benefit.

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[19] [1921] 1 Ch. 34.

[20] [1954] Ch. 434; [1954] 1 All E.R. 771.

[21] [1954] Ch. 446.

[22] [1896] 1 Ch. 250, 255; 12 T.L.R. 152.

I must consider next the words of this power. It is couched in the ordinary terms of a general power. I have already pointed out that the plaintiff can appoint for any purpose including a charitable purpose or to any charitable organization. If she appointed to a charitable purpose rather than an existing charitable entity, it would seem extraordinary if she had no power to delegate the exercise of the discretionary power to the persons she appoints as charitable trustees. It seems to me quite plain that she can appoint a new body of trustees as she was anxious to do providing, of course, that those trustees do not include Mr. Triffitt or any wife of his. Otherwise she has a complete and unfettered power, subject, of course, to consent, to appoint anyone, and that includes power to appoint persons as trustees for whatever objects or purposes she desires. In my judgment, in a widely drawn power such as this, it is to be implied in the power that the plaintiff can delegate the exercise of discretionary powers entirely. As I have said already, it is a beneficial power conferred upon her for her own benefit. She can with consent appoint to any person or persons she likes outside the two prohibited persons, and it would be quite wrong to put any fetter upon her powers. Such a power is inherent in the words contained in sub-clause (1) of clause 3. Accordingly, in my view, the deed she is anxious to execute is a proper exercise by her of the power conferred by clause 3 (1).

I have considered whether I ought to make any declaration, but, having heard argument upon it, I am satisfied that this is not a future or hypothetical question; the plaintiff is anxious to execute this document which is in draft, and I have no doubt will now at once do so. I think, therefore, that it is proper for me to make a declaration that she may validly do so.

I do not propose to answer question 1 of the summons because that goes outside what she is proposing to do, but I shall answer question 2 by stating that she is entitled, subject to consent, validly to execute the deed of appointment in the terms of the draft.

Declaration accordingly.

Solicitors: *Bell, Brodrick & Gray for Weatherhead & Butcher, Bingley.*

I. G. R. M.

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June 25, 26.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1957 P. No. 2057.]

Revenue — Estate duty — Property chargeable — Property passing on death—Bequest to trustee for life of income from shares of residue— " . . . so long as he shall act as . . . trustee . . . by way of " remuneration "—Duty claimed on death of trustee on capital of share—Whether exempted as income received " only . . . as holder " of an office "—Scope of exempting provisions—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

A testator gave to one of the trustees of his will the income from certain shares of his residuary estate " during his life so long " as he shall act as executor and trustee of this my will by way of " remuneration for so doing . . ." On the death of the trustee, the Inland Revenue Commissioners claimed estate duty under section 1 of the Finance Act, 1894,[1] as property passing on the

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[1] Finance Act, 1894 (as amended by the Finance Act, 1946), s. 1: " In " the case of every person dying after " the commencement of this Part of " this Act, there shall, save as herein- " after expressly provided, be levied " and paid, upon the principal value " ascertained as hereinafter provided " of all property, real or personal, " settled or not settled, which passes " on the death of such person a duty, " called 'estate duty,' at the gradu- " ated rates hereinafter mentioned, " and the existing duties mentioned " in the First Schedule to this Act " shall not be levied in respect of pro- " perty chargeable with such estate " duty."

S. 2: " (1) Property passing on the " death of the deceased shall be " deemed to include the property fol- " lowing, that is to say:—(*a*) Pro- " perty of which the deceased was at " the time of his death competent to " dispose; (*b*) Property in which the " deceased or any other person had " an interest ceasing on the death of " the deceased, to the extent to which " a benefit accrues or arises by the " cesser of such interest; but exclu- " sive of property the interest in " which of the deceased or other per- " son was only an interest as holder " of an office, or recipient of the " benefits of a charity, or as a cor- " poration sole; . . . (2) Property " passing on the death of the deceased " when situate out of the United " Kingdom shall be included only, if, " under the law in force before the " passing of this Act, legacy or suc- " cession duty is payable in respect " thereof, or would be so payable but " for the relationship of the person to " whom it passes. (3) Property pass- " ing on the death of the deceased " shall not be deemed to include pro- " perty held by the deceased as " trustee for another person, under " a disposition not made by the " deceased, or under a disposition " made by the deceased more than " five years before his death where " possession and enjoyment of the " property was bona fide assumed by " the beneficiary immediately upon " the creation of the trust and thence- " forward retained to the entire exclu- " sion of the deceased or of any " benefit to him by contract or " otherwise."

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death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an office," and that it therefore came within the exemption from duty in section 2 (1) (*b*) of the Act:—

Held, that the Court of Appeal was bound by the dichotomy between sections 1 and 2 of the Finance Act, 1894, enunciated by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270, and, accordingly, since on the trustee's death his shares of the testator's residuary estate admittedly passed under section 1, the provisions of section 2 (1) (*b*) (which exempt from duty property in which the deceased was only interested as the holder of an office) had no application, and that estate duty was payable on the trustee's death.

The observations of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 1 All E.R. 14 considered.

In re Duke of Norfolk [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664 considered.

Decision of Danckwerts J., ante, p. 513; [1958] 1 All E.R. 550 affirmed.

APPEAL from a decision of Danckwerts J.[2]

The following statement of facts is taken from the judgment of Danckwerts J. This summons arose out of the provisions of the will of the late Viscount Northcliffe, and the question asked was whether on the death of Henry Preuss Arnholz (who was an executor and trustee of the will) estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which Arnholz was entitled immediately before his death under the terms of the will.

Lord Northcliffe made his will on March 22, 1919; he also made three codicils, but the provisions of them were not relevant on the present question. Lord Northcliffe died on August 14, 1922, and his will and codicils were duly proved on February 23, 1923, by the executors therein named.

By his will Lord Northcliffe appointed Arnholz (who was a solicitor) and Sir George Augustus Sutton to be his executors and trustees. By clause 6 of his will he devised and bequeathed his real and personal estate upon the usual trusts for conversion and the resulting residuary trust fund was directed to be held upon trust to pay the net income arising therefrom in each year in the shares and manner directed in the following paragraphs of clause 6. The direction in paragraph (26) was "As to three

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[2] Ante, p. 513; [1958] 1 All E.R. 550.

"equal one-hundredth parts of the said income to the said Henry "Preuss Arnholz during his life so long as he shall act as executor "and trustee of this my will by way of remuneration for so doing "and in addition to any professional charges which he may be "entitled to make in accordance with clause (23) of this my "will."

Paragraph (27) directed the payment of seven equal one-hundredth parts of the said income to Sir George Augustus Sutton during his life so long as he should act as executor and trustee of the will by way of remuneration for so doing and in addition to the specific legacy given him under clause 1 of the will.

By paragraph (28) Lord Northcliffe declared that on the failure (whether in his lifetime or afterwards) of each of the trusts declared respectively by sub-clauses (1) to (27) of that clause of the will the shares or share of income which were the subject of the trust which should have failed (including all additions thereto under the present provision) should be added to the income of such of the said trusts created by such sub-clauses (1) to (27) of clause 6 of the will as should not have failed and to the last one of such trusts when all but one should have failed and in every case except the last such addition to each trust should be in the proportion which the income then subject to that trust (including income accrued under this present provision) should at that date bear to the income then subject to the others or other of the said trusts which should not have failed (including income accrued under this present provision).

The division of the income into 100 shares was in fact upset by the addition of provisions for the payment of three more one-hundredth shares in the second codicil dated June 23, 1920. This difficulty was resolved by a decision of Russell J. on July 28, 1924, that the additional three shares be shared equally with the gifts in clause 6 of the will so that everyone took so many 1/103 shares instead of 1/100 shares.

By clause 10 of the will the capital of the residuary estate was dealt with by certain charitable gifts.

By clause 19 of the will the testator conferred very wide discretionary powers on his trustees, stating that it was his intention that Arnholz, whom he had known since he was 10 years old, and Sir George Augustus Sutton, whom he had known since the year 1890, both of whom were well acquainted with his wishes and intentions with regard to his estate, and in whose business capacity and fairness and integrity he had the fullest confidence, and other the trustees or trustee for the time being of his will should have the fullest freedom of action and the widest and most absolute and uncontrolled discretion in all matters whatsoever relating to the administration of his estate and the carrying out of the purposes of his will.

Sir George Augustus Sutton died on December 7, 1947. No claim to estate duty on the shares of the capital of the estate in respect of which he was receiving the income on the occasion of his death was made by the Inland Revenue Commissioners.

Arnholz died on August 31, 1955. Immediately before his death he was receiving the income of 3/49½ shares of capital of the residuary estate. On the occasion of his death a claim had been made by the Inland Revenue Commissioners that estate duty was payable on those shares of capital under the provisions of section 1 of the Finance Act, 1894.

The Public Trustee took out the present summons to have determined whether the claim by the commissioners to estate duty on Arnholz's death was correct.

Danckwerts J. held that the claim to duty succeeded on the ground that the exemption in section 2 (1) (*b*) of the Finance Act, 1894, only applied in respect of property within the extended meaning given to property passing on the death in section 2, and had no application to duty payable under section 1.

The Public Trustee appealed.

John Pennycuick Q.C. and *J. A. Wolfe* for the Public Trustee. The Public Trustee's case is based on a careful analysis of sections 1 and 2 of the Finance Act, 1894. There are two opposing interpretations of these sections. First, there is that of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners*,[3] who there said that the sections were mutually exclusive. Secondly, there is that of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners*,[4] who considered that section 2 extends the scope of the expression "property passing" in section 1 to certain types of property whether they in fact pass or not. It is submitted that on its true construction section 2 is an overlapping and extending section; it is not a section merely extending the provisions of section 1. Section 1 of the Finance Act, 1894, is the only charging section. If it stood alone, the only property which would be brought into charge would be property which actually changed hands at death. Section 2 is not a charging section. It merely enlarges the scope of section 1. The word "includes" in section 2 extends the meaning of property in section 1. That extension may take one of two forms. The section may only bring within section 1 property not within its original scope, or it may be an overlapping section which includes as well property comprised in the term "property" in its natural meaning. "Property of which the deceased was at the time of his "death competent to dispose" in paragraph (*a*) of section 2 (1) is an example of the latter class. It includes the deceased's free estate, although that passes under section 1. That "property "of which the deceased was competent to dispose" includes free estate appears from sections 6 (2), 8 (3), 22 (2) (*a*). Likewise, property in which the deceased had an interest ceasing on his death in paragraph (*b*) on its natural meaning includes settled property passing under section 1. The semi-colon in paragraph (*b*) of section 2 (1) which precedes the proviso is significant. The first part of paragraph (*b*) widens the scope of the property passing to include property in which the deceased had an interest ceasing at his death. The proviso excludes property vested in him as the holder of an office. It is submitted that the proviso to paragraph (*b*) covers property which actually passes as well as property which is deemed to pass. Paragraph (*d*), on the other hand, is concerned wholly with property which does not actually pass. It is not disputed that subsections (2) and (3) of section 2 apply to section 1 as well as to section 2.

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[3] [1899] A.C. 198; 15 T.L.R. 270.

[4] [1956] A.C. 491; [1956] 1 All E.R. 14.

Until the observations of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners*,[5] the question whether sections 1 and 2 could overlap had not received much attention. The point was considered, however, in *Attorney-General* v. *Milne*.[6] The present appears to be the only class of case where the suggested distinction between sections 1 and 2 can now arise. In 1914 the difference between the two sections arose in connexion with settled estate duty. In the *Cowley* case[7] it was held that on the death of a tenant for life the property passed under section 1 and not under section 2 (1) (*b*). The observations that sections 1 and 2 were mutually exclusive were obiter. In *Attorney-General* v. *Dobree*[8] Channell J. put the matter as the appellants put it here. [Reference was made to the observations of Lord Haldane L.C., Lord Atkin, Lord Dunedin and Lord Parker in *Attorney-General* v. *Milne*,[9] and of Lord Haldane L.C. in *Nevill* v. *Inland Revenue Commissioners*.[10]]

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[5] [1956] A.C. 491.

[6] [1914] A.C. 765; 30 T.L.R. 476.

[7] [1899] A.C. 198.

[8] [1900] 1 Q.B. 442; 16 T.L.R. 80.

It was not necessary for the Court of Appeal in *In re Duke of Norfolk*[11] to consider the relationship between sections 1 and 2, and the observations there made on that relationship were obiter. [Reference was made to *In re Cassel's Will Trusts*.[12]]

The construction put by Lord Radcliffe in the *Sanderson* case[13] on sections 1 and 2 was, it is submitted, correct. The relationship between sections 1 and 2 has only been put in issue in that case and in the *Milne* case.[14] In no other case has the distinction between the two sections had any importance.

On the point of stare decisis, it has to be borne in mind that until this decision the application of Lord Macnaghten's dictum that the sections were mutually exclusive had no practical consequences. It had not been acted upon in fact. The result of Lord Radcliffe's expression of opinion is that it is open to the Court of Appeal to put its own construction on sections 1 and 2 (1) (*b*). [Reference was made to *De Trafford* v. *Attorney-General*.[15]]

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown. Looking at the matter from a common sense point of view, there is a distinction between sections 1 and 2. The difference between an annuity and a life interest was pointed out in *In re Lambton's Marriage Settlement*[16] and the *Norfolk* case.[17] The distinction between the two sections underlies most cases. Although paragraphs (*a*) and (*c*) of section 2 (1) include property passing under section 1, they also include much which does not so pass. So far as there is an overlapping with section 1, the property in question is outside the ambit of section 2. The proviso in the second limb of paragraph (*b*) is tied up with the first limb and cannot be made to apply to section 1. The decisions in the *Milne*[18] and *Sanderson*[19] cases were concerned with the meaning of the word "pass" and not with the problem which arises here. There was a passing here under section 1 and no benefit arose under section 2 (1) (*b*).

E. Blanshard Stamp following. What is contemplated by the proviso to section 2 (1) (*b*) is that a stipend is attached to an office. No benefit is attached to a trusteeship. It is a pure chance how much a trustee may get. Here a particular trustee was given a benefit, but he was not given a benefit as the holder of an office.

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[9] [1914] A.C. 765, 768, 773, 774, 779.

[10] [1924] A.C. 385, 389; 40 T.L.R. 341.

[11] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[12] [1947] Ch. 1; [1946] 1 All E.R. 32.

[13] [1956] A.C. 491.

[14] [1914] A.C. 765.

[15] [1935] A.C. 280; 51 T.L.R. 298.

[16] [1952] Ch. 752; [1952] 2 T.L.R. 68; [1952] 2 All E.R. 201.

[17] [1950] Ch. 467.

[18] [1914] A.C. 765.

[19] [1956] A.C. 491.

John Pennycuick Q.C. in reply. The proviso to paragraph (*b*) applies when payment is only taken as the holder of an office. It is not necessary that the payment should be annexed to the office. It is submitted that sections 1 and 2 are overlapping sections and that Lord Macnaghten's dictum which would make them exclusive should not be applied here.

LORD EVERSHED M.R. The originating summons in this case raised the question of the liability to estate duty under the Finance Act, 1894, in respect of a share of the income of the estate of the late Lord Northcliffe which one Henry Preuss Arnholz, who died on August 31, 1955, had enjoyed for his life.

I do not think it necessary that I should go at length into the facts or, indeed, into the arguments of this case, both of which are fully stated in the judgment of Danckwerts J.[1] Suffice then to say that under Lord Northcliffe's will the income of the residuary estate was, for a period terminating as provided by the will, divided among a number of income beneficiaries, each taking a specified share or fraction, so that when any one income beneficiary died, the total income was then divided among the survivors or survivor.

At the date of Arnholz's death his share amounted to three of the 49½ shares into which the income was then divisible; but the interest in the income which Arnholz enjoyed was expressed to be given to him by paragraph (26) of clause 6 of Lord Northcliffe's will as being in respect of his acting as executor and trustee, and by way of remuneration for his so doing; though the will also contained a reference to the fact that Arnholz was indeed a very old friend of the testator.

By an order of the court made in *In re Northcliffe*,[2] it was held that on the death of any income beneficiary, save at any rate the last, there was a "passing" within the terms of section 1 of the Finance Act, 1894, of a share of the corpus of the estate corresponding to the share of the income which at his death the dying income beneficiary had enjoyed.

The claim to duty has been resisted by the Public Trustee,

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[1] Ante, p. 513; [1958] 2 All E.R. 550.

[2] [1929] 1 Ch. 327.

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as the present trustee of Lord Northcliffe's estate, in reliance upon the last three lines of paragraph (*b*) of section 2 (1) of the Finance Act, 1894.

In order to make that statement intelligible, I will read the whole paragraph, which is introduced by the opening sentence of the subsection: "Property passing on the death of the deceased "shall be deemed to include the property following, that is to "say:— . . . (*b*) Property in which the deceased or any other "person had an interest ceasing on the death of the deceased, "to the extent to which a benefit accrues or arises by the cesser "of such interest; but exclusive of property the interest in which "of the deceased or other person was only an interest as holder "of an office. . . ."

Accordingly, it has been the contention of the Public Trustee, following an earlier decision in *Attorney-General* v. *Eyres*,[3] that the interest which Arnholz had as an income beneficiary was only an interest as the holder of an office, namely, the office of executor and trustee; but since the exemption appears in the second half of paragraph (*b*) of section 2 (1), and since it has been held and is conceded that there was here a passing of a proportionate share of the corpus under section 1, it will be apparent that the contest has raised the question of the application (and, indeed, under Mr. Pennycuick's argument, the validity today) of the celebrated dichotomy between sections 1 and 2 (1) of the Finance Act, 1894, which is enshrined in the well-known speech of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [4] in 1899.

Mr. Pennycuick has also contended that even though the dichotomy has the consequence, if valid, that the Crown cannot charge under the terms of paragraph (*b*) of subsection (1) of section 2, but must direct their attention exclusively to section 1 of the Act, none the less the exempting words, introduced after a semi-colon by the words "but exclusive of property," amount to an exemption which is not limited by the scope of paragraph (*b*), but is of general application and corresponds accordingly to the exemptions which subsections (2) and (3) of section 2 of the Act of 1894 confer. I understand that Mr. Pennycuick finds some peg in the semi-colon to which he seeks to attach that argument.

I confess that upon that last matter I have not been at all persuaded that those words of exemption in paragraph (*b*) can be interpreted save as a qualification of the earlier language of paragraph (*b*) itself; and, if that is right, then Mr. Pennycuick is faced, as he concedes, with the formidable difficulty that if the dictum of Lord Macnaghten must be treated as binding upon us today, then he cannot rely upon something which is exclusive to paragraph (*b*) of section 2 (1) of the Act, since the charge admittedly is made under section 1.

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[3] [1909] 1 K.B. 723; 25 T.L.R. 298.

[4] [1899] A.C. 198; 15 T.L.R. 270.

On the other side, Sir Lynn Ungoed-Thomas, for the Crown, has intimated an argument—though he has not developed it—that, on the facts of this case, Arnholz could not be said to have enjoyed his interest as holder of an office within the meaning of paragraph (*b*) of section 2 (1), so that no question at all arises on that paragraph. In the circumstances, I do not find it necessary to say anything upon that argument, save to record the fact that Danckwerts J. rejected it.

However, Sir Lynn has also contended, as I follow him, that even if today the dichotomy cannot be as rigid as might have previously been supposed, still, if the subject is to rely upon those exempting words in paragraph (*b*), he must say that his interest is one which is properly described and brought into charge by virtue of the enlarging effect of paragraph (*b*), as distinct from being something which has come into charge by virtue of section 1 of the Act. Again, in the circumstances, I do not find it necessary to say anything upon that point either.

Mr. Pennycuick's argument concedes that until a very recent case, that of *Sanderson* v. *Inland Revenue Commissioners*,[5] he would have been in very great difficulty in prevailing upon this court to say that we could now treat Lord Macnaghten's dictum as not excluding him from any reference to paragraph (*b*) of section 2 (1) of the Act; but in that case Lord Radcliffe, in the course of his speech, indicated that this dictum should, to use his own words, be resigned [6] "to the list of the many minor mysteries "of the law." Mr. Pennycuick says that we, having so resigned it, can treat the matter as res integra, and, in so doing, should decide the matter in his favour.

It cannot, I think, be disputed that Mr. Pennycuick's argument has formidable and attractive points in its support. For example, he relied upon the language of paragraph (*a*) of the subsection, which I will read, again prefacing it by the introductory words: "Property passing on the death of the deceased shall "be deemed to include the property following, that is to say:— "(*a*) Property of which the deceased was at the time of his death

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[5] [1956] A.C. 491; [1956] 1 All E.R. 14.

[6] [1956] A.C. 491, 501.

"competent to dispose." It is certainly a forceful contention to observe that "property of which the deceased was at the time of "his death competent to dispose," according to the ordinary use of the language, would include the testator's own free estate, no less than property over which he had but a general power of appointment. So it is Mr. Pennycuick's contention that, notwithstanding Lord Macnaghten's dictum, section 2 (1) cannot be regarded as dealing with property which is exclusive of property strictly within the first section; and that view is undoubtedly reflected in the speech of Lord Radcliffe. I add further that Lord Radcliffe notices language used by a very learned judge, Channell J., in *Attorney-General* v. *Dobree*,[7] and also the differing views expressed by the House in a later case, that of *Attorney-General* v. *Milne*.[8]

But, notwithstanding the weight of those arguments, I feel myself compelled to the view that in this court, as before Danckwerts J., we cannot do other than treat Lord Macnaghten's dictum as still applicable.

I think it will suffice, by way of supporting that conclusion, if I refer to the language of Jenkins L.J. in *In re Duke of Norfolk*.[9] The point was undoubtedly a different one, but no less clearly this court in its judgment, and in particular, the judgments of myself as Master of the Rolls and of Jenkins L.J., treated this dictum as one which this court must accept. Thus: "It is clearly not open," said Jenkins L.J.,[10] "to this court to "depart from the construction placed on sections 1 and 2 over "fifty years ago by the House of Lords in *Earl Cowley* v. *Inland* "*Revenue Commissioners*.[11]" The Lord Justice then proceeded to cite the whole of the passage from Lord Macnaghten's speech, and without repeating it here, I have it in mind that the language includes the statement that you should read section 1 as though it had been headed: "With regard to property passing "on death, be it enacted as follows," and that you should read section 2 as though it had been headed: "And with regard to "property not passing on death, be it enacted as follows."

If that view is binding, it must be conclusive in this case, for Mr. Pennycuick's reliance upon the terms of paragraph (*b*) of section 2 (1) becomes prefaced by the opening words: "With

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[7] [1900] 1 Q.B. 442, 450; 16 T.L.R. 80.

[8] [1914] A.C. 765; 30 T.L.R. 476.

[9] [1950] Ch. 467, 484; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[10] [1950] Ch. 467, 484.

[11] [1899] A.C. 198.

"regard to property not passing upon death"; and ex concessis the property with which we are concerned did pass on the death. In the *Sanderson* case [12] Lord Radcliffe's intimation of a contrary, or much modified, view was his own; it is, of course, plainly none the worse for that, but the four other members of the House did not share (or, if they did, they did not express their adherence to) Lord Radcliffe's opinion. Upon well-recognized principles, therefore, it would not be right for us, after so long a time during which Lord Macnaghten's speech has been hallowed by those who practise in this branch of the law, to treat the matter as one thrown open again by Lord Radcliffe's observations.

It may well be that this case has disclosed, perhaps for the first time, an anomaly which a strict application of the dichotomy has hitherto concealed, and there may be other anomalies—one being in relation to a corporation sole—which, if the views of the Crown, which have been indicated in argument, are right, may add some emphasis to the view that the matter is one which ought properly to be considered by, and resolved only by, the House of Lords itself.

The cases which have been cited were referred to by Danckwerts J., and it will, in the circumstances, not serve any useful purpose, or be of any use to the House (if this matter goes to the House) for me to repeat the citations or repeat the summary of the case as Danckwerts J. carefully and with accuracy expressed it.

Thinking, as I do, that we must still regard ourselves as bound by the view hitherto prevailing of the effect of Lord Macnaghten's speech in the *Cowley* case,[13] in my judgment, we can do no other than dismiss the appeal.

ROMER L.J. I agree. Mr. Pennycuick's submission to us on the inter-relation of sections 1 and 2 of the Finance Act, 1894, is, as he indeed concedes, plainly at variance with the opinion that Lord Macnaghten expressed on the subject in the *Cowley* case,[13] and it is for that reason that it seems quite clear to me that this court cannot accept it, whatever views we might have formed on the matter if we had been able to approach it de novo.

As the Master of the Rolls has pointed out, in the *Duke of Norfolk* case [14] in 1950, this court said quite explicitly that Lord Macnaghten's opinion in the *Cowley* case,[15] was binding upon this court, and it seems to me, therefore, that the only question is as to whether anything that has happened since justifies us in now expressing a different view and saying that the matter is open to review by us.

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[12] [1956] A.C. 491.

[13] [1899] A.C. 198.

[14] [1950] Ch. 467.

[15] [1899] A.C. 198.

The only material thing which could possibly be relied upon is the speech of Lord Radcliffe in the *Sanderson* case.[16] Notwithstanding the great weight which must, of course, be attributed to Lord Radcliffe's opinion it was not, at all events, expressly adopted by the other Law Lords; and it seems to me impossible to say that his speech amounts in itself to a justification for departing from the view which this court expressed in the case of the *Duke of Norfolk*.[17] In those circumstances, therefore, the matter cannot be considered by us today, because we are just as bound now, as we were in 1950, by the views of Lord Macnaghten.

I desire to express no opinion, because it is not necessary to do so, on the submission which Sir Lynn Ungoed-Thomas made, that the Crown was entitled to succeed in this case, even apart from the question of Lord Macnaghten's views. On the pure question of construction arising under section 2 (1) (*b*), which the judge described as follows[18]: "The question still "remains whether the excluding provision which is contained in "section 2 (1) (*b*), is capable of application to the case of "property which passes within the unextended or natural mean-"ing of section 1 of the Act." I entirely agree with the conclusion at which he arrived, and which he expressed as follows: "It seems to me that grammatically the second or excluding "portion of this provision must refer to the preceding or including "part of the provision." I entirely accept that view of the matter, and I have nothing further to say upon that point or upon any of the other matters which have been discussed.

ORMEROD L.J. I agree that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Russell & Arnholz; Solicitor of Inland Revenue.*

B. A. B.

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[16] [1956] A.C. 491, 500.

[17] [1950] Ch. 467.

[18] Ante, pp. 513, 527.

In re COLE.
WESTMINSTER BANK LTD. *v.* MOORE AND ANOTHER.

[1957 C. No. 2172.]

C. A.

1958
June 9, 10;
July 17.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Charity—Children—Deprived of parents—Devise—Income to be applied "for the general benefit and general welfare" of children in local authority's home—Whether valid charitable trust created—Charitable Uses Act, 1601 (43 *Eliz.* 1, *c.* 4), *preamble—Children and Young Persons Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 35, 44, 57, 61, 76—*Children Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 12, 15.

Administration of Estates—Payment of debts—Property liable—Mortgaged property—Part specifically devised and part falling into residue—Whether liability apportionable—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35.

The defendant county council maintained "Southdown House" under the power conferred by section 15 of the Children Act, 1948, as a home for the accommodation of children committed to their care. A testator, by clause 6 of his will, devised to his trustees two freehold houses upon trust to apply the income therefrom "for "the general benefit and general welfare of the children for the "time being in Southdown House . . . as a small token of my "appreciation of the work carried on at such House," with a provision that, if the house should cease to be used as a home, the income should be used at the council's discretion for the "benefit "of the children in other homes for children" carried on under the auspices of the council. At the death of the testator the two specifically devised freeholds were jointly charged together with a third property, which formed part of the residue, to a bank to secure the testator's overdraft which amounted to £2,094 16s. 1d.:—

Held, (1) that, on the true construction of clause 6, the trust thereby created was not intended to enure for the benefit only of the children in the home when the testator died but also for the benefit of future inmates from time to time of the home and, accordingly, that the devise failed unless it was for a charitable purpose.

(2) (Lord Evershed M.R. dissenting) that the gift in clause 6 was not a gift for the endowment or maintenance of Southdown House as a home but that the gift was "for the general benefit and "general welfare" of the children in it and since, on the true construction of that phrase, the income of the devised premises could be applied in ways which were not charitable on any construction of the preamble to the Charitable Uses Act, 1601, the devise in clause 6 was not a valid charitable gift.

Chichester Diocesan Fund and Board of Finance (*Incorporated*) v. *Simpson* [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60 and *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513 followed.

Per Romer L.J. I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal Institution with amenities would be charitable, which would appear to me to be an impossible contention.

Per Lord Evershed M.R. The inference to be drawn from the preamble is that the care and upbringing of children who for any reason have not got the advantage or opportunity of being looked after and brought up by responsible and competent persons, or who could, for these or other reasons, properly be regarded as defenceless or "deprived," are matters which prima facie qualify as charitable purposes.

The decision of Lord Romilly M.R. in *Brownson* v. *Lawrance* (1868) L.R. 6 Eq. 1 and of Harman J. in *In re Biss, decd., Heasman* v. *Biss* [1956] Ch. 243; [1956] 1 All E.R. 89 that where part of property mortgaged is specifically devised and another part falls into residue a sufficient contrary intention is indicated to exclude the provisions of section 35 (1) of the Administration of Estates Act, 1925,[1] questioned.

Decision of Harman J. affirmed.

APPEAL from a decision of Harman J.

The testator, Henry Gibbins Cole, by his will dated December 24, 1952, after appointing the plaintiffs the Westminster Bank Ltd. and H. J. Philcox together with the defendant Frederick Arthur Moore to be his executors and trustees and making certain bequests, by clause 6 provided as follows: "I devise my freehold houses 'St. Anton' Meads Road Seaford aforesaid and "'Kinninghall' Meads Road Seaford aforesaid unto the East "Sussex County Council upon trust to apply the income arising "therefrom or from any substituted investments of the proceeds "of sale of the said dwellinghouses for the general benefit and "general welfare of the children for the time being in Southdown "House Firle Road Seaford aforesaid as a small token of my

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[1] Administration of Estates Act, 1925, s. 35: "(1) Where a person "dies possessed of, or entitled to ". . . an interest in property, which "at the time of his death is charged "with the payment of money . . . and "the deceased has not by will deed or "other document signified a contrary "or other intention, the interest so "charged shall, as between the "different persons claiming through "the deceased, be primarily liable for "the payment of the charge; and "every part of the said interest, "according to its value, shall bear a "proportionate part of the charge on "the whole thereof. (2) Such contrary "or other intention shall not be "deemed to be signified (*a*) by "a general direction for the payment of debts or of all the debts "of the testator out of his personal "estate, or his residuary real and "personal estate, or his residuary real "estate; or (*b*) by a charge of debts "upon any such estate; unless such "intention is further signified by "words expressly or by necessary "implication referring to all or some "part of the charge."

"appreciation of the work carried on at such House. If however "Southdown House shall be sold or cease to be utilized as a home "for children then I direct that the East Sussex County Council "shall apply the income from the said dwellinghouses or any "substituted investments at the council's absolute discretion for "the benefit of the children in other homes for children carried "on under the auspices of the East Sussex County Council I "desire that the superintendent for the time being of Southdown "House should be consulted with a view to ascertaining his views "as to the allocation of the before mentioned income."

By clause 7 the testator gave the residue of his real and personal estate to his trustees upon trust to sell and to hold the net proceeds upon trust after payment of his debts, funeral and testamentary expenses, including the estate duty on "St. Anton" and "Kinninghall," Meads Road, upon trust for the defendant Frederick Arthur Moore absolutely.

The testator died on April 5, 1955. At the date of his death "St. Anton" and "Kinninghall" were charged together with freehold premises known as "Wytham Place," Sleaford, which formed part of the residue, by a memorandum of deposit in favour of the Westminster Bank Ltd. to secure money amounting at his death to £2,094 16s. 1d. owing by the testator to the bank.

"Wytham Place" had been sold by the testator's trustees for £6,000. "St. Anton" and "Kinninghall" had been retained. These properties were valued for probate respectively at £1,250 and £1,100.

The Westminster Bank Ltd. and Herbert John Philcox took out this summons asking (1) whether the sum of £2,094 16s. 1d. owing by the testator to the bank at his death ought to be paid wholly out of his residuary estate or ought to be charged rateably on the freehold property; (2) whether the specific devise of "St. Anton" and "Kinninghall" to the East Sussex County Council was a valid charitable devise. The defendants to the summons were the residuary legatee, Frederick Arthur Moore, and the East Sussex County Council.

The clerk to the council made an affidavit in which he stated "Southdown House . . . is a home provided and maintained by "the council pursuant to the Children Act, 1948, s. 15, for the "accommodation of children in their care. Such children are "either children received into the care of the council under "section 1 of the said Act or children committed to their care "under the Children and Young Persons Act, 1933, ss. 57, 62, "63, 64 (as amended), 66 and 67 to which sections of the said "Acts I respectfully ask leave to refer.

"The said home provides accommodation for up to thirty "children of either sex between the ages of five and fifteen. The "said home is used as a short-stay and intermediate home, that "is to say, as a home for children requiring to be cared for for "periods ranging from a few weeks to two years or thereabouts, "and is not intended to serve as a permanent home for young "children who are likely to remain in the council's care until they "reach the age limit under the Children Act, 1948, of eighteen "years or are otherwise likely to be in the council's care for long "periods.

"The staff of the said home consists of a married couple who "are in charge of the said home and two female assistants, who "all reside in the said home, together with non-resident domestic "staff. The children in the said home attend the usual local "schools. No more education is provided in the said home than "would be provided by parents in a normal domestic home, to "which it is the object of the council to make the said home "approximate as nearly as possible.

"The cost of providing and maintaining the said home is pro-"vided partly from grants out of moneys provided by Parliament, "partly from the general rate fund of the administrative county "of East Sussex and partly from contributions received from "parents under the Children Act, 1948, ss. 23 and 24, and the "Children and Young Persons Act, 1933, s. 86, as amended."

Harman J., on December 5, 1957, declared that the whole of the sum of £2,094 16s. 1d. owing by the testator to the Westminster Bank Ltd. ought to be paid wholly out of the proceeds of sale of Wytham Place. He further held that the devise of "St. Anton" and "Kinninghall" failed.

The East Sussex County Council appealed against that part of the decision which held that the devise of "St. Anton" and "Kinninghall" failed. The defendant, Frederick Arthur Moore, cross-appealed against the declaration that the whole of the sum of £2,094 16s. 1d. was payable out of the proceeds of sale of Wytham Place and asked that it might be declared that the whole of that sum ought to be charged rateably on the three freehold properties charged.

Denys Buckley for the East Sussex County Council. The first question in the council's appeal is whether, on the true construction of the testator's will, the gift is limited to the children in Southdown House at the time of the testator's death. It is first submitted that the gift being for the benefit of the children "for the time being in Southdown House" limits the beneficiaries to the children in the home at the date of the testator's death, and so no question of perpetuity arises.

If that is wrong and this is a trust in perpetuity of the income of the devised properties, it is submitted that it is a general trust for the benefit of the children in the home and is, as such, a good charitable trust.

This is a home provided by the council under the Children and Young Persons Act, 1933, and the Children Act, 1948. The children in the home may be described as "deprived children." They are in the position of orphans or quasi-orphans. They are without effective parents, or children who are in need of special care and protection. The purpose of the home is to afford the care and protection which the children cannot provide for themselves. All the children are good objects of charity. It is not contended that this gift is valid as a gift for the relief of poverty. The object of the home is to prevent the exposure of these children to physical and moral dangers and to provide for those who have no adequate home of their own and to turn them into good citizens. This gift is within the spirit and intendment of the preamble to the statute of Elizabeth I, in that the trusts are charitable in the same sense as some of the trusts found in the preamble. [Reference was made to *In re Clarke* [2] and *In re Strakosch, decd.*[3]] The children are "impotent" or in a condition which requires charitable assistance. The words in the phrase "relief of aged, impotent or poor" in the preamble must be read disjunctively. Children are "impotent" by reason of their age and lack of experience. The cause the testator has here in view is as worthy a cause as a rest home, which has been held to be a good charitable purpose. Anything to do with the formation of character must be educational. So far as any of these children have indulged in conduct which in an adult would be criminal, or so far as they are out of control, their reform is educational in the widest sense. The fact that the income may in fact relieve the rates does not make the gift the less a charitable gift: *Attorney-General* v. *Bushby.*[4] Nor does the fact that their parents may be liable to contribute to the maintenance of the children in the home prevent the gift from being charitable if what the children receive is a benefit of a charitable character. The maintenance of the home is a charitable activity: *Attorney-General* v. *Duke of Northumberland.*[5]

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[2] [1901] 2 Ch. 110; 17 T.L.R. 479.

[3] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

[4] (1857) 24 Beav. 299.

The judge only considered whether this trust was within the terms of the preamble, not whether it was within the intendment. The children in this home are not really bad children or they would have been sent to an approved school or to Borstal. A gift for the benefit of these children is charitable.

W. J. C. Tonge for the defendant Frederick Arthur Moore, the residuary legatee. Every trust for what may be considered a good purpose may not be a legally charitable trust. There have been several decisions in which a trust has been held to fail although it was for a benevolent purpose: *Williams' Trustees* v. *Inland Revenue Commissioners*[6]; *Inland Revenue Commissioners* v. *Baddeley.*[7] It is accepted that in interpreting the preamble in 1958 it has not to be shown that the trust is covered by any particular words in the preamble, but it appears from Lord Greene M.R.'s judgment in *In re Strakosch, decd.*[8] that the type of activity in question must correspond with something in the preamble. The court is not entitled to go away from the statute. The trusts must be comparable to trusts in the preamble. This is not an educational trust. In this home the children are not educated. If the phrase "aged, impotent or poor" is read disjunctively, it does not cover these children. They are not aged or poor. "Impotent" means suffering from some physical incapacity, broken down or decrepit: see the definition of "impotent" in the Shorter Oxford Dictionary.

The children in this home come under the provisions of the Act of 1933 or the Act of 1948. If it is held that this is a good charitable gift, it will mean that any gift for the benefit of children, whether the object of the gift is within the preamble to the statute or not, is good. This is not a gift for the maintenance of the home itself but for the general benefit of the children in it, including juvenile delinquents. The income may be applied for purposes which are not strictly charitable, and the gift, accordingly, is not a valid charitable gift.

Denys Buckley in reply. The wording of the gift shows that the testator's intention was to benefit the children in the home in every way. If the superintendent thought that it would contribute to make the home a proper and happy home for deprived children, part of the trust income could be spent in purchasing a television set for them. It must be assumed that the income would be applied reasonably. The question is whether the purpose is a charitable purpose. The fact that the State makes provision in the same field, as in the case of hospitals for the sick, does not mean that private individuals cannot create a valid charitable trust operating in the same field. The preamble to the statute does not contain a complete catalogue of charitable trusts. The objection that juvenile delinquents may benefit from the trust is not a valid one. Their way of life needs correction. The work of the home is to provide such correction. A trust for the benefit of the inmates of a borstal institution might be a charitable trust: see *Inland Revenue Commissioners* v. *Pemsel*,[9] *per* Lord Herschell. If a trust for the protection of animals is charitable, a trust to protect children by providing them with a proper home background must be so also.

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[5] (1889) 5 T.L.R. 237.

[6] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[7] [1955] A.C. 572; [1955] 1 All E.R. 525.

[8] [1949] Ch. 529, 537.

[Their Lordships, having indicated that they proposed to reserve judgment on the council's appeal, proceeded to hear argument on the residuary legatee's cross-appeal.]

W. J. C. Tonge for the defendant Frederick Arthur Moore, the residuary legatee. The two properties specifically devised to the council should bear a rateable proportion of the moneys charged thereon jointly with the freehold property which forms part of the residue. The effect of section 34 (3) and Part II of the First Schedule to the Administration of Estates Act, 1925, is to place property included in a residuary gift in a higher category for the discharge of debts than specifically devised property. These provisions are subject to the provisions of the Act as to charges on the deceased's property. Section 35 (1) and (2) of the Act overrides section 34 (3). It is submitted that the testator cannot have an involuntary contrary intention to exclude the operation of section 35 (1). The fact that part of the property charged falls into residue is not of itself the expression of a contrary intention. For section 35 (1) not to apply there must be an express intention to the contrary. The defendant does not accept that *In re Biss, decd.*[10] was correctly decided. This point was not argued or decided in *In re Turner*.[11]

It is submitted (1) that on the construction of this will it is distinguishable from that before the court in *In re Biss*.[12] Here the testator has expressly exonerated the specifically devised properties from estate duty. This shows that his mind was directed to charges. The fact that he directed payment of debts generally is not a contrary intention. (2) If that construction is wrong, it is submitted that *In re Biss, decd.*[12] should be overruled. There is no justification for that decision; it is based on the view that a testator may have an involuntary contrary intention. Section 35 (1) contemplates that the contrary intention shall be expressed in the will itself or in some other document. Romilly M.R.'s decision in *Brownson* v. *Lawrance*[13] was regarded as of no authority until the decision in *In re Biss.*[14] Romilly M.R.'s decision was criticized and not followed in *Hensman* v. *Fryer*[15] and *Sackville* v. *Smyth.*[16]

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[9] [1891] A.C. 571; 7 T.L.R. 657.

[10] [1956] Ch. 243; [1956] 1 All E.R. 89.

[11] [1938] Ch. 593; 54 T.L.R. 697; [1938] 1 All E.R. 560.

[12] [1956] Ch. 243.

Denys Buckley for the East Sussex County Council. The original rule was that a specific legatee or devisee was entitled to take his gift unencumbered and a debt charged thereon was payable out of residue: *Knight* v. *Davis*[17]; *Bothamley* v. *Sherson.*[18] Locke King's Act of 1854 altered that rule and specifically devised property subject to a charge had to bear that charge. Until 1926 a residuary gift of realty took effect as a specific devise. That is not so now under Part II of the First Schedule of the Administration of Estates Act, 1925. Property included in a residuary gift ranks before specifically devised property as regards liability to discharge debts. The effect of the charge is to exclude that part of section 35 which provides that every part of the property charged shall bear a rateable share of the debt charged. Where part of the property forms part of residue, the residue is assets for payment of debts before specifically devised property. The decision in *Gibbins* v. *Eyden*[19] was based on the fact that real estate, when included in the residue, was specifically devised. The reasoning of that case and of *Sackville* v. *Smyth*[20] is based on the old law. *In re Smith*[21] is not helpful, since there both dispositions were specific. In construing section 35 it is important to have in mind the history of this matter. It is not contended that there is anything in the will which throws the liability to discharge this mortgage on the testator's general residuary personalty, but it is submitted that there is shown an intention that so much of the realty as is charged and forms part of the residue should bear the charge in exoneration of the specifically devised properties. The cross-appeal should be dismissed.

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[12] [1956] Ch. 243.
[13] (1868) L.R. 6 Eq. 1.
[14] [1956] Ch. 243.
[15] (1867) L.R. 3 Ch. 420.
[16] (1873) L.R. 17 Eq. 153.
[17] (1833) 3 Myl. & K. 358.
[18] (1875) L.R. 20 Eq. 304.
[19] (1869) L.R. 7 Eq. 371.
[20] L.R. 17 Eq. 153.
[21] (1886) 33 Ch.D. 195.

Christopher Slade for the plaintiffs, the trustees of the will.

Cur. adv. vult.

July 17. The following judgments were read.

LORD EVERSHED M.R. I will ask Romer L.J. to deliver the first judgment.

ROMER L.J. This is an appeal from an order of Harman J. dated December 5, 1957, whereby he made a declaration as to the manner in which certain charges created in favour of the Westminster Bank Ltd. by the testator during his lifetime should be borne, and a further declaration that a specific devise contained in clause 6 of the testator's will failed and fell into residue. The defendants, the East Sussex County Council, appeal against the second of these declarations, and a cross-notice of appeal has been served by the defendant Moore against the first declaration. The cross-notice only arises for decision if this court reverses the judge's declaration as to the invalidity of the specific devise, and I accordingly propose to consider that question first. [His Lordship read clauses 6 and 7 of the will and continued:]

The testator died on April 5, 1955, and probate of his will was granted to the plaintiffs and the defendant Moore out of the District Probate Registry at Lewes on September 28, 1955. On July 16, 1957, the plaintiffs issued an originating summons asking for directions as to the charges created by the testator as hereinbefore mentioned, and also asking whether the specific devise contained in clause 6 of the will was a valid charitable devise or whether it failed and fell into residue.

The first point which arises on this second question is whether the devise in clause 6 " for the general benefit and general welfare " of the children for the time being in Southdown House " was intended to enure for the benefit only of the children who were in the home when the testator died or for the benefit of future inmates from time to time as well. It is perfectly clear to me that the latter is the true view. The words " for the time being " sufficiently show this in themselves, but when one adds the consideration that the testator was directing the application of income and not of capital, and the fact that the home was only intended to provide temporary accommodation for the children received in it, no room, in my judgment, is left for doubt.

On this view of the matter, then, the devise fails unless it was for a charitable purpose. The purposes for which Southdown House is carried on are stated in the affidavit of the clerk of the East Sussex Council. [His Lordship read the relevant passages in the affidavit and continued:] In order to ascertain the classes or categories of children whom the council have to receive into the home reference must be made to the Children Act, 1948, and the Children and Young Persons Act, 1933. By section 1 of the former Act local authorities have to receive children under 17 (though the age limit in Southdown House is 15) who have no parent or guardian or whose parents or guardian have abandoned them; those whose parents or guardians are for various reasons prevented from providing for their proper accommodation, maintenance and upbringing; and, in either case, if it appears to the local authority that its intervention is necessary in the interests of the welfare of the child. Section 11 provides that Part II of the Act relates to the powers and duties of local authorities in relation to children received by them into their care under section 1 of the Act and (among others) children who by an order of any court under the Act of 1933 have been committed to their care as a fit person. By section 15 local authorities have to provide homes as therein mentioned. Under section 57 of the Act of 1933 any court by or before which a child or young person is found guilty of an offence punishable in the case of an adult with imprisonment shall have power to commit him to the care of "a fit person" (which, by section 76, includes a local authority). By section 62 juvenile courts may commit a child or young person in need of care and protection to the care of "a fit "person." The expression "in need of care and protection" in relation to children is defined by section 61 of the Act and includes (among others) those who are exposed to moral danger or are beyond the control of their parents, and those against whom certain offences have been committed (see also sections 63 and 64). I think that the sections to which I have referred sufficiently indicate the kind of children who can and must be received into such homes as Southdown House; and, in relation to such children, the local authority (by virtue of section 75 (4)) is to have the same rights and powers and be subject to the same liabilities in respect of their maintenance as if it were their parent.

Mr. Buckley, for the county council, contended before us, as he had contended before the judge, that the devise under clause 6 of the will is within the spirit and intendment of the preamble to the Charitable Uses Act, 1601. The judge rejected the contention. According to the note we have of Harman J.'s judgment, the judge said that the children referred to in the relevant statutory provisions were not "impotent" nor "orphans," that the reference in the preamble to the "payment "of fifteens" had no application and that Southdown House was not a "house of correction." Mr. Buckley submitted to us that the gift should be upheld on the ground that the children in question are either orphans or in a position similar to that of orphans in that, having regard to their peculiar circumstances, they need care and attention which they cannot provide for themselves, but which are provided for them by the home. Their position, he said, is analogous to that of old people, and he submitted further that it would involve no misuse of language to describe them as "impotent." For these reasons he submitted that they came within the sense of the statute.

Now it may be (I say no more) that a gift for the endowment or maintenance of such a home as Southdown House would qualify as a valid charitable trust. That, however, is not the gift with which we are concerned. The devise in question is not to or for the benefit of Southdown House but "for the general "benefit and general welfare" of the children for the time being in it; and it appears to me that some at least of the argument before us was addressed to an issue which does not arise.

It is, of course, clear beyond controversy that if property is vested in trustees upon trust to apply the income for purposes, some of which are charitable and some of which are not, and the trust involves a perpetuity, then the whole gift fails; and none the less because the trustees do in fact apply the income to the specified charitable objects to the exclusion of those which are not charitable. A recent example of this rule is to be found in the well-known case of *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson.*[1]

The question then, as it seems to me, is whether the East Sussex County Council can, within the terms of their trust under clause 6 of the testator's will, apply the income of the devised properties to purposes which are not charitable, or whether the trust confines them to a charitable application of the income. In my judgment, it is reasonably clear that the income could be applied "for the general benefit and general welfare of the "children" in many ways that could not on any legitimate construction of the Statute of Elizabeth be regarded as charitable.

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[1] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60.

I will take only one illustration. It is permissible to suppose that at any given time all or a considerable proportion of the children in the home may consist of juvenile delinquents, children who are beyond their parents' control and children who have been exposed to moral danger. It would appear to me that the provision of a television set, or a gramophone and records and the like, might well be regarded as being for the general benefit (which I take to mean benefit in a general way) of such children, and that some of the devised income could be applied to the provision of such amenities without any breach of trust being committed by the council. It is quite true that the illustrations or examples which are given in the preamble to the Act of 1601 are not exhaustive, and a gift will be valid if it comes within the spirit and intendment of the statute: *Williams' Trustees* v. *Inland Revenue Commissioners.*[2] Nevertheless, I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal institution with amenities would be charitable, which would appear to me to be an impossible contention.

Mr. Buckley sought to avoid this conclusion by pointing to the reason of the devise as expressed by the testator, namely, " as a " small token of my appreciation of the work carried on at such " House." This language does not, however, confine the application of the income to the carrying on of the work nor narrow the manner in which the council can properly deal with the income. Mr. Buckley also relied on the testator's desire, stated at the end of clause 6, " that the superintendent for the time " being of Southdown House should be consulted with a view to " ascertaining his views as to the allocation of the before " mentioned income." Mr. Buckley suggested that the superintendent would only approve expenditure which was calculated to promote the physical well-being or moral welfare of the children, and that such expenditure would be for a charitable purpose. Without expressing any view as to whether it would or not, I do not think that Mr. Buckley's point sufficiently meets the difficulty; for, apart from the fact that the council would not necessarily be bound by the superintendent's views, I see no reason why he should not recommend or approve of an expenditure on mere amenities, if they were calculated to amuse and interest the children under his charge.

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[2] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

Accordingly, though for reasons which are somewhat different from those on which the judge founded his decision, I am of opinion that the devise in clause 6 of the will is invalid. On this view of the case it becomes unnecessary to consider or decide the point raised by the defendant Moore as residuary legatee on his cross-appeal. That question arises from the fact that by a memorandum of deposit dated November 24, 1952, the testator charged the two properties comprised in clause 6 of his will with the debt due by him to the Westminster Bank Ltd. By a memorandum of deposit dated November 25, 1952, the testator charged another freehold dwelling-house known as Wytham Place, Seaford, with the same debt. At his death the testator was indebted to the bank in the sum of about £2,094, which was charged on these three properties. The two specifically devised properties are still retained by the executors, and one of them was valued for probate purposes at £1,250 and the other at £1,100. Wytham Place, which formed part of the residuary estate, was sold by the executors for £6,000, and a question arose as to how the charge on the three properties should be borne. Harman J., following a previous decision of his own in *In re Biss, decd.*[3] made a declaration that the whole of the sum charged on the properties ought to be paid wholly out of the proceeds of sale of Wytham Place. By his cross-notice of appeal Moore asks that, in the event of the main appeal succeeding, a declaration should be made that the whole of the sum secured ought to be charged rateably upon the three freehold properties in proportion to their respective values. As in my judgment the council's appeal does not succeed, this point does not arise. I desire, however, to keep open, until it arises as an issue in some future case, the question whether the decision of the judge in *In re Biss, decd.*[3] and his corresponding decision in the present case were correct. I would dismiss the appeal.

ORMEROD L.J. I agree with Romer L.J. that this appeal should be dismissed, and largely for the same reasons.

Mr. Buckley argued the case before the judge, and indeed before this court, on the basis that the gift in question was really a gift for the endowment of Southdown House, and that such a gift would be within the spirit and intendment of the preamble to the Charitable Uses Act, 1601, and therefore valid as a

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[3] [1956] Ch. 243; [1956] 1 All E.R. 89.

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charitable trust. It appears from the note which is available of Harman J.'s judgment that he rejected this contention on the ground that the children who, by reason of the various relevant statutory provisions, might be committed to the care of the home did not of necessity come within any of the classes referred to in the preamble, and that Southdown House was not a home of correction, and he came to the conclusion that the devise was not a charitable gift and, as it tended to a perpetuity, was therefore bad.

The question emerged before this court in the course of the argument whether, on a proper construction of clause 6 of the will, the gift should be treated as one for the endowment or maintenance of Southdown House or as one for the benefit of the children for the time being committed to the care of those in charge of the home. The gift is one of income to be applied "for the "general benefit and general welfare of the children for the time "being in Southdown House." The fact that it is a gift of income and not capital, and is to be applied for the benefit and welfare of the children "for the time being" in the house, in my judgment, points strongly to the view that the gift was not intended to be for the endowment or maintenance of the home. It appears to be a fund intended to provide additional amenities for the children from time to time in the home which would not, or might not, in the ordinary way be provided for them by the local authority in the performance of their duties under the relevant statutory provisions. If this be the proper construction to put upon clause 6 of the will, it is unnecessary to decide whether a gift for the endowment or maintenance of Southdown House would be within the "spirit and intendment" of the Charitable Uses Act, and I express no view upon it.

The question which does remain is whether the gift, on the construction of the clause which I believe to be the right one, can be regarded as charitable. In my view it cannot be so regarded. There appear to be many ways in which the money in question can be applied which would be for the welfare and benefit of the children, and therefore within the terms of the gift, but would not be charitable gifts in the legal sense. In these circumstances, in my judgment, the gift is invalid; and I would dismiss the appeal.

Lord Evershed M.R. I have the misfortune to have arrived (I need not say, with very great diffidence) at a conclusion different from that which has commended itself to my brethren and to Harman J. I agree with them in rejecting Mr. Buckley's alternative suggestion that the gift was an absolute gift to those children whose chance it was to be at Southdown House at the moment of the testator's death. Mr. Buckley will, I hope, forgive me if I say no more upon an argument which (having regard to the language used by the testator) has seemed to me wholly untenable. But I have, in the end, formed the view that the gift of the income of " St. Anton " and " Kinninghall " " for the " general benefit and general welfare of the children for the time " being in Southdown House " ought to be regarded as a good charitable gift.

The conditions to be satisfied by a gift claiming to qualify as charitable are easy enough to state. The purposes of the donor must have the necessary public quality: and they must have the charitable character derived from the " spirit and intendment " of the preamble to the statute of the first Elizabeth. No question arises in the present case as to the public quality of the relevant disposition. But can its purposes be discerned to fall within the spirit and intendment of the preamble?

The problem, as I have said, is easy to state. The difficulty is, as it has so often been found to be in the numerous cases that have come before the courts, in the solution. It is not now in doubt that the scope or idea of " charity," which the examples in the preamble illustrate, is not limited to those examples or to other dispositions merely analogous to them (see *In re Strakosch, decd.*[4]). " Spirit and intendment " comprehend, as I understand it, all dispositions in which is discerned the essential " charitable " characteristic possessed in common by all the preamble's examples. Notwithstanding the passage of three centuries, during which the courts have been able to attach the charitable label to large numbers and varieties of dispositions (and to reject the claim to qualify in no less a number of cases), the underlying idea seems to remain, at times, as elusive as ever. The truth may be that the possible variations of expressed intention by testators and settlors are as the sands of the sea, and that no catalogue of illustrations, however long, can exhaust or confine charity's scope. Moreover, the spirit and intendment of the preamble, as of any collocation of words, may fairly be understood differently by different minds. So in this instance it has seemed to me, with due regard to the opposite conclusions of my brethren and Harman J., that the spirit and intendment of the Elizabethan statute is such as to cover the present case.

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[4] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

I agree with Harman J. that no useful clue can in the present case be derived from the word "impotent" in the trilogy "aged, impotent and poor." But Harman J., according to the note of his judgment, thought equally irrelevant the reference to preferment of orphans, since the children in the present case were not, or were not necessarily, orphans, and because by the word "preferment" was meant apprenticeship. But, in my judgment, this view involves a restriction of the class of charitable purposes to those that are, at best, strictly analogous to the illustrations stated in the preamble; and I do not understand the scope of charity to be so confined. In my judgment, the inference to be drawn from references such as those to the education and preferment of orphans, to schools of learning and free schools, and (perhaps also) to the marriage of poor maids; and the general emphasis in favour of gifts to and for persons suffering from disability and incapacity of various kinds, is that the care and upbringing of children, who for any reason have not got the advantage or opportunity of being looked after and brought up by responsible and competent persons, or who could, for these or other reasons, properly be regarded as defenceless or "deprived," are matters which prima facie qualify as charitable purposes. It was not doubted during the argument that gifts directed to the prevention of cruelty to children would be charitable: and the charitable qualification of such gifts depends, as I think, on the considerations which I have just stated, rather than on the ethical or improving notion of such an activity as it would be in the case, for example, of a gift for the prevention of cruelty to animals. Thus, it would appear to me that a trust established during the last century (that is, before Parliament had imposed any duty of care for children on local authorities) for the purposes of the protection or upbringing of children in the parish or town of X, who, owing to the death, incapacity or unfitness of their parents or otherwise, could not be properly protected or brought up, would have been held charitable. If I am right so far, then the charitable nature of such purposes is not displaced merely by the circumstance that their execution is made by Act of Parliament a duty of local authorities, any more than the care of the sick and maimed has ceased to be a charitable purpose by reason of the so-called nationalization of hospitals. (See, for example, *In re Hutchinson's Will Trusts* [5] and cases there cited.)

That, however, is not the end of the matter. The gift here is expressed to be "for the general benefit and general welfare of

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[5] [1953] Ch. 387; [1953] 1 All E.R. 996.

"the children . . . in Southdown House," and it is coupled with an expression of desire that the superintendent of Southdown House should be consulted "with a view to ascertaining his views "as to the allocation of the before mentioned income." The form of gift raises, therefore, two further questions, namely: (1) what exactly are the purposes for which, and the manner in which, the institution known as Southdown House is carried on; and (2) even if the answer to the first question is such that the furtherance of the purposes and activities of Southdown House is prima facie charitable, does the phrase "for the general benefit and general "welfare of the children" cover applications of income of the fund which would extend beyond the statutory duties of the local authority in conducting the home, or which, for this or other reasons, would themselves be non-charitable?

The authority for the East Sussex County Council's activities as regards Southdown House is derived from section 15 of the Children Act, 1948, which, by subsection (1), empowers a local authority to "provide, equip and maintain . . . homes for the accommodation of children in their care." Subsection (4) empowers the Home Secretary to make regulations as to the conduct of such homes; and, although no such regulations were referred to before us, it is to be noted that the regulations contemplated are directed to "securing the welfare" of the children in the homes with particular regard to such matters as accommodation, equipment and religious upbringing.

Section 15 of the Act of 1948 is in Part II of the Act, which (by section 11) is expressed to relate to the powers and duties of local authorities in relation to children received by them into their care under section 1 of the Act of 1948, and children who, by an order of any court under the Children and Young Persons Act, 1933, have been committed to the care of the local authority "as a fit person."

Section 1 of the Act of 1948 imposes a duty on local authorities to receive into their care children of the classes mentioned in the section, and (by subsection (2)) to keep them in their care so long as the children's "welfare" appears so to require. The classes of children referred to are those of children (appearing to be not more than 17) who have no parents or guardians or have been abandoned, and those whose parents or guardians are prevented by incapacity or other circumstances from "providing for [their] "proper accommodation, maintenance and upbringing." Finally, as regards the Act of 1948, section 12 requires a local authority to exercise their powers with respect to any child in their care "so "as to further his best interests, and to afford him opportunity "for the proper development of his character and abilities."

The Children and Young Persons Act, 1933, is expressed as a consolidating Act concerned with persons under 18, and is (putting the matter generally) designed to protect such young persons against cruelty and exposure to moral and physical danger, and also in relation to criminal and summary proceedings. The inclusion of local authorities in the category of "fit person" is provided by section 76, which imposes, accordingly, on local authorities the duty of undertaking the care of children.

Thus, section 35 requires the appropriate local authority to be notified when a child is brought before any court on an alleged offence or as being "in need of care or protection"; and by section 44 every court dealing with a child is to have regard to its "welfare" and in all proper cases to "take steps for removing "him from undesirable surroundings, and for securing that proper "provision is made for his education and training." There follow provisions for the establishment of juvenile courts, and by section 57 power is conferred on courts in the case of a child found guilty of an offence "punishable in the case of an adult with "imprisonment . . . to commit him to the care of a fit person."

Section 61 defines the meaning of the phrase child "in need "of care or protection"; that is to say (briefly), (1) a child who, having no parent or guardian or whose parent or guardian is unfit, is falling into bad associations, exposed to moral danger, or beyond control: and (2) a child against whom incest or other like offences have been or may be committed. Section 62 empowers a juvenile court to commit a child in need of care and protection to the care of a "fit person": and by section 64 a parent or guardian of an uncontrollable child is empowered to bring such child before a juvenile court for an order for the child's commitment to the care of a fit person. Finally, by section 75 (4) a fit person to whom a child has been committed has, in regard to that child, while the order is in force, the powers and duties of a parent. It is, however, made clear in this Act, as it is also made clear in the Act of 1948, that these powers and duties of a local authority are without prejudice to the obligation of a parent or guardian to contribute to the child's maintenance.

My summary of the complicated provisions of the two relevant Acts is necessarily incomplete but, I hope, not inadequate. It appears from the references which I have made that the home with which we are concerned is maintained by the East Sussex County Council for the care and upbringing of one or more of three possible classes of children, which may be briefly defined thus: (1) Children without parents or guardians, or with parents or guardians incapable for any reason of properly looking after them or bringing them up—what were called in the argument "deprived" children: (2) Children whose circumstances and surroundings expose them to moral or physical danger or contamination: and (3) Children who, for whatever reason, are out of control or uncontrollable, or have committed offences of a kind punishable in the case of an adult by imprisonment—what may for convenience be called, in modern terminology, "delinquent" children. For reasons which I have already attempted to state, a gift for the purpose of providing for the care and upbringing, in other words, a home for the class of "deprived" children, within the area of the local authority is, in my view, a gift constituted for charitable purposes. In my judgment, a similar gift for the benefit of children of the second class above named within the area, whether alone or in conjunction with "deprived" children, would, for like reasons, also be within the spirit and intendment of the preamble. But what of the third class, the class of delinquents? I agree with Harman J. that a home established for the care of such children cannot properly be described as a "house of correction," as that phrase is used in the statute of Elizabeth I. Nevertheless, if I am right in thinking that the care and protection of children of the first two classes above mentioned is prima facie within the spirit and intendment of the statute, the reference to houses of correction seems to me to support the view that the charitable nature of the purpose of looking after children is not negatived by the circumstance that some (or even all) of the children who require care and protection are children who have fallen into evil associations and evil habits. After all, the notion underlying the relevant provisions of the Acts of 1933 and 1948 is surely that children of the delinquent class have fallen into their bad habits and associations through lack of the care and protection which a home of the kind contemplated by the Acts can provide: and because, in the absence of such care and protection, they, as children, are defenceless against the temptations to which they are exposed. I should add that I do not think that the result is affected by the circumstance that the parents or guardians of the children are liable to contribute to their maintenance. There is no evidence before us of the extent to which in practice such contributions are obtained, but, in the nature of things, and in the light of the general scope and background of the legislation, it could not, in my view, have been or be contemplated that such contributions would play in truth other than an entirely incidental or ancillary part in the general conduct of the homes.

It was not suggested in argument that because the effect of the disposition of this testator would be in some relief of rates the result was materially affected. It follows, therefore, in my judgment, that if the purpose of the gift in the present case had been expressed to be towards the maintenance and equipment of the Southdown House in accordance with the obligation of the legislation, it would have qualified as a good charitable gift. But there remains the second question posed above—is the result altered by the use of the words " for the general benefit and " general welfare " of the children in the home? It is upon this form of words, as I believe, that my brethren have particularly relied as being inconsistent with a valid charitable gift. As my brother Romer has put it in his judgment (which I have had the advantage of reading in advance), the effect of the words is to justify the use of the income of the property devised for the provision of mere amenities, such as a television set or a gramophone, for children of what I have called the delinquent class.

In my judgment, the question is really one of the construction of the words I have quoted. The testator must, I think, be taken to have known the statutory purpose of Southdown House and the statutory powers and duties in regard to it of the East Sussex County Council. Indeed, he refers in terms to the nature of the work at the home and to his desire that his gift should be taken as a mark of his appreciation of that work. Construed in that context, the words " general benefit and general welfare " ought not, in my judgment, to be treated as meaning anything more than " generally for the benefit and welfare of the children in " accordance with the local authority's obligations under the " statutes." I must not be taken to be saying that the result would be different though the effect were to be to enable the council to apply that gift in acquiring for the children amenities which they might not otherwise be able to enjoy. It has been held (and, in my view, rightly) that a trust for providing amenities in publicly owned hospitals, if otherwise tending to further the purposes of the hospitals or to promote their efficiency, constitutes a good charitable gift (see, for example, *In re White's Will Trusts* [6]); and I see no reason why a parity of reasoning should not be applied to the case of the children in Southdown House. But I have, in my citations from the relevant legislation, emphasized the use, more than once, of the word "welfare." I refer again to the language of section 12 of the Act of 1948: ". . . so as to further his best interests, and to afford him "opportunity for the proper development of his character and "abilities." In my judgment, the words used by the testator do no more than briefly express the same thing. Funds provided generally for the care of the sick and maimed are necessarily used for their general welfare and benefit, and intended by their very application to be so used. So here, the purpose of the provision of maintenance and equipment of Southdown House is for the general benefit and general welfare of the resident children. Indeed, the use of the adjective "general" seems to me rather to postulate the application of the gift towards the welfare and benefit of the children taken as a whole, than to contemplate its use for providing for particular children special advantages or means of enjoyment beyond the scope of the general intention of the Act in establishing these homes.

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[6] [1951] W.N. 152; [1951] 1 All E.R. 528.

If, therefore, matters rested with me, I would allow the appeal, and it would be necessary to consider the question raised by the cross-appeal, which is of the following nature. At the date of the testator's death the property, the subject of the devise with which I have so far dealt, was, together with another house belonging to the testator and known as Wytham Place, the subject of charges in favour of the testator's bankers, Westminster Bank Ltd. Wytham Place was not the subject of any specific devise contained in the testator's will, and formed accordingly part of the testator's residue given in favour of the first defendant, Mr. Tonge's client. If the specific devise of "St. Anton" and "Kinninghall" can take effect as a good charitable gift, the question then arises whether these properties must bear a due proportion of the amount owing to the Westminster Bank at the testator's death; or whether they are entitled to throw the whole amount of the debt upon Wytham Place (or its proceeds of sale), which was the subject of the testator's residuary disposition. On the view which Harman J. took on the first question, this second matter did not in strictness arise: but as it had been fully argued before him, the judge expressed his opinion against the claim of the residuary legatee. My brethren have, upon the first question, reached the same conclusion as Harman J. and, since the second question does not therefore require a decision from this court, they have preferred to express no view upon it. In the circumstances, I, too, prefer to express no conclusion upon it, but in case this matter should go further, I have thought that I might usefully add some observations, though I do so briefly, upon the point raised by the cross-appeal.

The question depends upon the effect of section 35 of the Administration of Estates Act, 1925, when applied to the facts of the present case. [His Lordship read section 35 (1) so far as relevant to the present case, and continued:] The argument of Mr. Buckley was to the effect that since, for the purpose of paying unsecured debts, residuary realty was chargeable in priority to realty specifically devised, and could therefore be sensibly regarded (from the point of view of the liabilities to which the estate was subject) as ranking lower than specifically devised realty, the specific devise of " St. Anton " and " Kinninghall " ought to be regarded as expressing " a contrary or other intention " within the meaning of section 35 (1) of the Administration of Estates Act, 1925. Harman J. said that this view appealed to him in any case and in the absence of authority: but the judge found support for his view in the decision of Lord Romilly M.R. in *Brownson* v. *Lawrance*,[7] which he (Harman J.) himself had followed in the case of *In re Biss, decd.*[8] *Brownson* v. *Lawrance* [9] was a decision under Locke King's Act, properly called the Real Estate Charges Act, 1854. The Master of the Rolls had based his view on the premise that real estate, the subject of a residuary devise, could not be regarded as specifically devised. It is now conceded (as was pointed out, for instance, by Malins V.-C. in *Gibbins* v. *Eyden* [10]) that the premise was, as the law then stood, not well founded. For this reason it is also conceded that *Brownson* v. *Lawrance* [11] must be regarded as not having been correctly decided. But it was said that since the validity of Lord Romilly M.R.'s premise must, under the Administration of Estates Act, 1925, be now taken as restored, the authority of *Brownson* v. *Lawrance* [11] ought to be regarded as re-established.

This, however, is not the end of the tale of authority. In *Sackville* v. *Smyth* [12] the same point came before Lord Romilly M.R.'s successor, Sir George Jessel M.R. The facts were that a testator devised part of his estate, to which he was entitled subject to a mortgage, for the benefit of his widow for life and the remainder to his residuary devisee. He bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate. Sir George Jessel's short judgment was as follows [13]: "I can find in this will no contrary "or other intention within the meaning of the exception in Locke "King's Act. It has been enacted that a general direction for "payment of debts out of personal estate shall not be deemed "to exonerate mortgaged properties, and what is there in this "case to take it out of the general rule? If I were to decide "otherwise, I should have to hold that every devise of a life "interest in real estate was an expression of a contrary intention. "It does not appear to me that Locke King's Act was intended "to apply as between specific and residuary devises in the way "it was held to apply in *Brownson* v. *Lawrance*.[14]"

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[7] (1868) L.R. 6 Eq. 1.

[8] [1956] Ch. 243.

[9] L.R. 6 Eq. 1.

[10] (1869) L.R. 7 Eq. 371.

[11] L.R. 6 Eq. 1.

[12] (1873) L.R. 17 Eq. 153.

It will be seen that the view of Sir George Jessel M.R. was directly contrary to that of Lord Romilly M.R., apart altogether from the premise on which the latter had been based: for in Sir George Jessel M.R.'s view, a specific devise of realty could not of itself amount to an expression of contrary intention within the meaning of Locke King's Act. Thirteen years later these conflicting views were considered by North J. in *In re Smith* [15]; and that judge preferred the view of Sir George Jessel M.R. to that of Lord Romilly M.R. No doubt seems to have been since cast on North J.'s opinion during the 70 years which elapsed before *In re Biss, decd.*[16] came before Harman J. It does not appear. however, that the cases of *Sackville* v. *Smyth* [17] and *In re Smith* [18] were cited to Harman J. either in *In re Biss, decd.*[19] or in the present case. Had they been so cited, it is possible that Harman J. would have decided the two cases before him otherwise than as he did. As I have earlier said, I prefer in the circumstances—including the circumstance that *In re Biss, decd.*[19] has not been the subject of any appeal—to leave the matter open for further consideration (in the light of all the cases to which I have referred), if and when the point again arises.

Appeal dismissed.
No order on cross-appeal.
Declaration as to payment of £2,094 16s. 1d. *struck out of order.*
Leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for H. S. Martin, Lewes; Haslewoods for Philcox & Son, Seaford.*

B. A. B.

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[13] L.R. 17 Eq. 153, 155.
[14] L.R. 6 Eq. 1.
[15] (1886) 33 Ch.D. 195.
[16] [1956] Ch. 243.
[17] L.R. 17 Eq. 153.
[18] 33 Ch.D. 195.
[19] [1956] Ch. 243.

1958
July 2.

Wynn-Parry J.

In re EL SOMBRERO LTD.

[No. 00536 of 1958.]

Company—Meeting—Jurisdiction of court to order—Annual general meeting—Failure of directors to hold—Application by shareholder to court to direct holding of meeting—Opposition by directors—" If " for any reason it is impracticable to call a meeting of the com- " pany "—" Impracticable," meaning of—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 135 (1).

The applicant was the holder of 900 shares in a private company whose capital was £1,000 divided into 1,000 shares of £1 each. The two respondents, who were at all material times the only directors of the company, each held 50 shares. No general meeting of the company had ever been held and no annual return filed. The company's articles of association had adopted Part II, Table A in the First Schedule to the Companies Act, 1948, subject to the alteration that the quorum of general meetings should be two persons present in person or by proxy. The applicant by originating summons asked the court to make an order under section 135 (1) of the Companies Act, 1948,[1] directing the convening and holding of a meeting, which was opposed by the respondents.

On appeal from the registrar's refusal to make such an order:—

Held, (1) that the question raised by the word " impracticable " was merely whether in the particular circumstances of the case the desired meeting of the company could as a practical matter be conducted.

(2) That on the true construction of section 135 there was nothing to prevent the court intervening in a proper case and where the application before it was opposed by other shareholders.

(3) That the present case was eminently one in which the court ought to exercise its discretion, because otherwise it would be depriving the applicant of his statutory right under section 184 (1) to remove the respondents as directors, and because the respondents had failed to perform their statutory duty to call an annual general meeting.

Motion.

The appellant, Harry Laubscher, on this motion asked that an order of Mr. Registrar Berkeley by which he refused to direct the convening and holding of a meeting of El Sombrero Ltd.

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[1] Companies Act, 1948, s. 135 (1): " If for any reason it is impracticable " to call a meeting of a company " in any manner in which meetings of " that company may be called, or to " conduct the meeting of the company " in manner prescribed by the articles " or this Act, the court may, either " of its own motion or on the appli- " cation of any director of the com- " pany or of any member of the " company who would be entitled to " vote at the meeting, order a " meeting of the company to be " called, held and conducted in such " manner as the court thinks fit. . . ."

under section 135 of the Companies Act, 1948, be discharged or varied by the court.

The company was incorporated on March 21, 1956, as a company limited by shares and had an authorized and issued share capital of £1,000 divided into 1,000 shares of £1 each. The applicant was the registered holder of 900 shares and each of the personal respondents was the registered holder of 50 shares. The respondents were already directors of the company when the applicant acquired his shares, and had remained directors. No general meeting of the company, including the first annual general meeting, had ever been held and no annual return had been filed. In July, 1956, when the applicant acquired his shares from former shareholders, the company's articles of association had adopted Part II of Table A in the First Schedule to the Companies Act, 1948 (subject to certain alterations), including the provision that the quorum at general meetings of the company should be two members present in person or by proxy and that, if within half an hour from the time appointed for a meeting the quorum should not be present, the meeting, if convened on the requisition of members, should be dissolved.

The applicant by originating summons under section 135 of the Companies Act, 1948, asked for an order that the personal respondents, as directors of the company, should forthwith call, hold and conduct (or alternatively that the court might convene) an extraordinary general meeting of the company for the purpose of considering and, if thought fit, passing certain resolutions (set out in the schedule to the summons) and for a direction to be made that one member of the company present in person or by proxy should be deemed to constitute a quorum at such meeting. The respondents opposed the making of such an order. The companies' registrar held that the court ought not to exercise its discretion by making an order under section 135 in the face of opposition. The applicant appealed.

Charles Russell Q.C. and *L. H. L. Cohen* for the applicant. This is an application under section 135 of the Companies Act, 1948, for the court to convene a meeting of the defendant company and to give a direction that one shall be a quorum. The jurisdiction under section 135 to order a meeting to be called, held and conducted and to give consequential directions arises when it is for any reason "impracticable" to call a meeting of a company in due manner or to conduct the meeting of the company in manner prescribed by the articles or the Act. It is the latter jurisdiction which the applicant invokes. He can call a meeting by requisition as often as he wishes, but it is submitted that it is "impracticable to conduct the meeting" because the only two other members oppose the holding of a general meeting and decline to attend any such meeting, and the quorum is two members present in person or by proxy. "Impracticable" is not synonymous with "impossible": see *In re Edinburgh Workmen's Houses Improvement Co. Ltd.*[2] (which was decided under section 115 of the Companies Act, 1929, which corresponds to the present section 135), but has a wider meaning. The opposition of the personal respondents makes the conducting of a meeting "impracticable" and stultifies the policy of the Act that general meetings shall be held annually and that a member or members entitled to more than 50 per cent. of the votes at general meetings should be able to remove a director and replace him with a new director.

There is no justification in authority for the principle stated by the companies' registrar, namely, that if an application under section 135 of the Companies Act, 1948, is opposed, then the court will refuse the application. That is merely an assertion and nothing more. If there is a section of the Act that interferes with the articles, it would be odd indeed if the court were to be fettered in the exercise of its jurisdiction whenever there was opposition. It would mean that one opponent, however small his opposition, could say that the court had no jurisdiction.

The registrar pins everything on the fact that there is a type of contract conferring a right on the respondents not to be removed from office. But the policy of the Act is that notwithstanding the articles the majority of shareholders should decide who should constitute the board. The language of section 184 is that the company may by ordinary resolution remove a director, but there is no doubt of the Act's policy. If that policy is stultified deliberately by directors seeking to hold on to their office, then as a matter of practice that is a case where the court should exercise its powers under section 135. The policy of the Act stated in section 184 points to its policy under section 135.

It is said that the directors have contractual rights and entitlements to prevent a quorum by virtue of the articles, but when reading Table A one must read it as if the relevant parts of section 135 were incorporated in it. The company agreed on a quorum of two in the contract, which states that if two cannot be found to make a quorum, then the court can direct that a quorum of one is sufficient.

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[2] 1935 S.C. 56; 1934 S.L.T. 513.

The court has jurisdiction notwithstanding opposition to the application and should exercise it. The court should support the policy of the Act by saying that these directors cannot cling on to office. [*Rayfield* v. *Hands*[3] was referred to.]

I. J. Lindner Q.C. and *Raymond Walton* for the personal respondents. This is a private company, and in a private company, at any rate, the articles embody the contract between the parties. [Reference was made to *Rayfield* v. *Hands*[3] and section 20 of the Companies Act.] One of the terms of the contract was that, although the applicant had the preponderance of the voting right, the other two members of the company, the personal respondents, were in a position, if they so wished, to prevent him exercising that right in certain directions, namely, to prevent him removing them from the board. Section 135 was never designed to abrogate the contract into which the parties had entered, and it would be wrong to use it for that purpose.

The applicant is really introducing a subjective test into section 135, which requires an objective test, just as section 131 does. The applicant is really saying that it is impossible for *him* to conduct a meeting *for the special purpose for which he wants to conduct it.* A meeting of the company can be held and properly conducted at any time and he himself can requisition a meeting for any other purpose and it will then be held and conducted properly.

Raymond Walton following. The question is whether section 135 is objective or subjective. The test under section 135 (1), whether it is practicable for any meeting to be held, convened and conducted properly, is objective. The answer here is that it is practicable to call, convene and conduct a meeting in accordance with the articles. The respondents could call and conduct one at any time; so could the applicant except on this one topic, namely, removing the respondents from office. It is not impracticable for a meeting to be held and conducted. Alternatively, the meeting was called and conducted in accordance with the articles of the company. Part of the conduct was its termination in accordance with the articles, and it is of this that the applicant complains.

Wynn-Parry J. stated the facts and continued: The first point of law which arises involves the construction of section 135 (1) of the Companies Act, 1948, the examination being directed to consider the scope of the phrase "If for any reason it is impracticable "to call a meeting of a company in any manner in which meetings "of that company may be called, or to conduct the meeting of the "company in manner prescribed by the articles or this Act . . ." It is to be observed that the section opens with the words "If for any reason," and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are ". . . it is impracticable to call a meeting of a company . . ." The question then arises, what is the scope of the word "impracticable"? It is conceded that the word "impracticable" is not synonymous with the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word "impracticable" is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. Upon the face of the section there is no express limitation which would operate to give those words "is impracticable" any less meaning than that which I have stated, and I can find no good reason in the arguments which have been addressed to me on behalf of the respondents for qualifying in any way the force of that word "impracticable" or the interpretation which I have placed upon it, and therefore upon that point I am in favour of the applicant.

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[3] [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.

It was contended that the court could not or ought not to direct a meeting under this section where there was, as there is here, opposition, and, indeed, strong opposition; and in the course of his judgment the registrar said: "So far as I am aware there "has never been a case where the court has made an order under "section 135 in the face of opposition to such an order. . . ." It will be observed that the registrar is careful not to go so far as to say as a conclusion that the court has no jurisdiction to make an order under the section in the face of opposition. There is nothing I can find in the language of the section which would even indicate that the jurisdiction can only be invoked if, at least, there is no opposition, and I hold that, on the true construction of the section, there is nothing to prevent the court intervening in a proper case and where the application before it is opposed by other shareholders.

It is interesting to see that the registrar, having made the observation which I have quoted as to the absence of any authority for the proposition that an order could be made under the section in face of opposition, goes on to say: ". . . and I do not "consider that under the circumstances of this case the court "ought to exercise its discretion by making such an order." What, as I read his judgment, really operated in his mind was this, that the two respondents had the power to prevent the desired meeting being held and, as he puts it in one passage of his judgment, having considered the Scottish case of *Edinburgh Workmen's Houses Improvement Co. Ltd.*[1]: "That case affords "me some guidance as to the meaning of 'impracticable' in "section 135 in relation to the quorum provisions of articles and "perhaps would justify me in holding that it is impracticable in "the circumstances of the present case to conduct a meeting of "the company in the manner prescribed by the articles for the "purpose of passing the resolutions mentioned in the schedule to "the originating summons since the personal respondents will see "to it that a quorum is never present at a meeting convened for "that purpose; but beyond that the case does not assist me for "it is clearly distinguishable from the facts of the present case "in that there the court made an order in relation to a public "company to enable resolutions to be passed which an overwhelming majority of the shareholders in number and value "wanted passed, to which no member had expressed dissent and "in circumstances in which the three non-assenting shareholders "with their 48 shares would still have an opportunity, if so "minded, of coming before the court to express their views and "oppose any order which would render the resolutions effective. "Whereas in the present case I am asked to make an order in "relation to a private company at the request of one member "(the applicant) in the face of strenuous opposition from the "other two (the personal respondents) to enable the one to "remove the other two from their directorships, notwithstanding "that under the terms of the contract by which their respective "rights are governed the two respondents are entitled to prevent "the applicant from removing them at a meeting requisitioned "by him."

Later, referring to an argument which had been put before him by Mr. Cohen on behalf of the applicant, namely, that the applicant, as a majority shareholder, is entitled to remove the personal respondents from the board under section 184, and that the court would be stultifying the applicant's statutory powers if he refused to make the order which was asked for, the registrar said this: " I cannot accept that proposition as correct. His " power of removing a director under section 184 is limited to " doing so by ordinary resolution and under the terms of his " contract with the respondents they have power to prevent him " from passing such a resolution if they wish to do so. I do not " consider that the court ought to exercise its powers under " section 135 in such a way as to deprive the respondents against " their will of that power."

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[1] 1935 S.C. 56; 1934 S.L.T. 513.

With all respect to the registrar, I think those passages proceed upon a misconception. It was conceded by Mr. Lindner, and, in my view, very properly conceded, that it was not possible to say that the respondents, by virtue of the articles, had such right as is implicit in the use of the word " entitled " by the registrar, to prevent the applicant from holding and conducting the meeting. They have, it is true, a power to prevent him from doing so, but that power is not derived from the articles; it is derived from the accidental distribution of the shareholding in this company, and that, to my mind, explains the whole difficulty which has arisen.

I therefore arrive at the stage where I hold that I have jurisdiction in this case, and there is nothing to prevent me exercising the discretion which is given under the section if I choose to exercise it. It is true that I am sitting as an appellate court, but I am entitled to consider the question of discretion, because, in my view, as I have held, the registrar has misdirected himself on a question of law. In my judgment, this is eminently a case in which the court ought to exercise its discretion; first, because if the court were to refuse the application it would be depriving the applicant of a statutory right, which, through the company, he is entitled to exercise under section 184 (1), to remove the respondents as directors; secondly (and I think this is a proper matter to take into account as part of the reasons for deciding to exercise my discretion), the evidence disclosed that the respondents are failing to perform their statutory duty to call an annual general meeting. The period within which they should have held an annual general meeting expired at some date in October, 1957. Their excuse in the evidence is that there would be no use in convening and holding an annual general meeting, because the accounts for the first period of the company's history are not yet available. I have read the evidence with care, and I do not accept it as bona fide evidence. There is a clear statutory duty on the directors to call the meeting whether or not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not. It cannot possibly serve as an excuse for failing to perform that statutory duty. It is quite obvious that the only reason why the respondents refuse to call an annual general meeting is because the inevitable result of convening and holding that meeting would be that they would find that they had ceased to be directors. Reference was made to other proceedings between the parties and to a motion for the committal of the applicant for the alleged offence of endeavouring to procure that one of the respondents should not be present in court. It appears to me that I cannot properly take those other matters into account; I have no knowledge of them at all, and were I in any way to take them into account, I would be, at any rate to some extent, prejudging the issues between the parties one way or the other.

For these reasons, therefore, I propose to accede to this application and to direct a meeting of the company to be held under the power given me by section 135 of the Companies Act, 1948.

[After a discussion it was agreed that the order should direct that one member of the company present in person or by proxy should be deemed to constitute a quorum and that the meeting should be held at the offices of the applicant's solicitors.]

Order accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Callingham, Griffith & Bate.*

P. P.

BAUME & CO. LTD. *v.* A. H. MOORE LTD.

[1955 B. 72.]

C. A.

1958
Feb. 26, 27, 28; *Mar.* 28.

Jenkins, Romer and Ormerod L.JJ

Passing Off—Risk of confusion—Bona fide use of own name on goods—Whether defence.

Trade Mark—Infringement—Bona fide use of own name, defence of—Whether applicable to use as a trade mark—Risk of confusion—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 4 (1), 8 (*a*).

The plaintiffs, an English company, carried on the business of the sale of watches and were the proprietors of the registered trade mark "Baume." The defendant company, who carried on business in the sale of (inter alia) watches, sold watches bearing the mark "Baume & Mercier, Genève," or "Geneva"; these watches were manufactured by a Swiss company called Baume & Mercier S. A., who had manufactured watches for many years.

In an action by the plaintiffs to restrain infringement of registered trade mark and passing off:—

Held, as regarded the claim in passing off (1) that there was no exception to the rule that no man was entitled so to describe or mark his goods as to represent that they were the goods of another.

Dictum of Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.* (1924) 41 R.P.C. 277, 291 applied.

(2) That it was not a defence to an action for passing off that the defendant had no intention to deceive.

Dictum of Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead* (1913) 30 R.P.C. 493, 506; 29 T.L.R. 237 applied.

(3) That the plaintiffs had established that the sale by the defendants of Baume & Mercier watches was reasonably calculated to cause confusion in the trade and in the minds of the public, and that, accordingly, the claim in passing off succeeded.

Per curiam. Inasmuch as the defendants had incorporated the whole of the plaintiffs' registered mark in their own mark, albeit that it contained in addition the words "& Mercier, Genève," or "Geneva," they were in breach of section 4 (1) of the Trade Marks Act, 1938; but that as the use of such name was a bona fide use on the defendants' goods of the name of the manufacturer, they were protected by section 8 (*a*) of the Act of 1938, which protected such use of the manufacturers' name as a trade mark.

Decision of Danckwerts J., ante, p. 137; [1957] 3 All E.R. 416 reversed.

APPEAL from Danckwerts J.[1]

The plaintiff company, Baume & Co. Ltd., or their predecessors in title, had been trading as distributors and sellers of watches in this country for approximately one hundred years, and, since 1878, had been registered under the Trade Marks Acts as proprietors of the mark "Baume" (trade mark No. 14263) for watches and all other descriptions of horological instruments.

The defendants, A. H. Moore Ltd., were importers and distributors of watches and had for a few years past been importing into this country watches made by a Swiss firm of the name of "Baume & Mercier, Société Anonyme." These watches had been sold by the defendants in boxes bearing on the outside the words "Baume & Mercier, Genève," or, in some cases, "Geneva." The watches bore on the dial, and also on the inside of the movement the same words "Baume & Mercier,

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[1] *Ante*, p. 137; [1957] 3 All E.R. 416.

"Genève," or "Geneva." At one time members of the family of "Baume" were connected with the Swiss firm.

The plaintiffs commenced an action against the defendants claiming (1) an injunction restraining them from infringing the plaintiffs' registered trade mark, No. 14263; (2) an injunction restraining them from advertising, offering for sale or selling watches or other horological instruments, not being the goods of the plaintiffs, under the name "Baume and Mercier" or any other name containing the word "Baume" and calculated to pass off or to enable others to pass off such watches or other horological instruments as and for the plaintiffs' watches or other horological instruments; (3) destruction, or obliteration on oath from all watches or other horological instruments, advertising or other matter in the possession, custody and control of the defendants of the word "Baume" or any word so nearly resembling the same as to be calculated to deceive; (4) an inquiry as to damages or at the plaintiffs' option an account of profits.

The defendants, by their defence, admitted that they had offered for sale, sold, and supplied watches bearing the mark "Baume & Mercier, Genève," and that all such watches were, in fact, watches manufactured by a Swiss firm of the name of "Baume & Mercier, S. A."; and they denied the alleged infringement of trade mark or that their use of the name "Baume" as part of the name "Baume & Mercier" was calculated to deceive or cause confusion.

Danckwerts J. held that, though there was some risk of confusion, the use of the name "Baume & Mercier, Genève," was a bona fide use on the defendants' goods of the name of the manufacturer; that section 8 (*a*) of the Trade Marks Act, 1938,[2] protected such use of the manufacturers' name as a trade mark; and that such bona fide use afforded also a defence to passing off.

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[2] Trade Marks Act, 1938, s. 4 (1): "Subject to the provisions of this "section, and of sections 7 and 8 of "this Act, the registration (whether "before or after the commencement "of this Act) of a person in Part A "of the register as proprietor of a "trade mark (other than a certifica-"tion trade mark) in respect of any "goods shall, if valid, give or be "deemed to have given to that person "the exclusive right to the use of "the trade mark in relation to those "goods and, without prejudice to the "generality of the foregoing words, "that right shall be deemed to be "infringed by any person who, not "being the proprietor of the trade "mark or a registered user thereof "using by way of the permitted use, "uses a mark identical with it or so "nearly resembling it as to be likely "to deceive or cause confusion, in the "course of trade, in relation to any "goods in respect of which it is regis-"tered, and in such manner as to "render the use of the mark likely to "be taken either—(*a*) as being use "as a trade mark; or (*b*) in a case "in which the use is use upon the "goods or in physical relation thereto "or in an advertising circular or other "advertisement issued to the public, "as importing a reference to some

The plaintiffs appealed.

Guy Aldous Q.C. and *John Whitford* for the plaintiffs. Danckwerts J. was wrong both on the question of infringement and of passing off. On the question of passing off, the following principles can be deduced from the authorities: A person has no right to represent his goods as those of another. If the representation is proved, then the legal consequences follow whatever form the representation may take, for example, a picture or writing. It is no defence to a passing-off action that the defendant had no intention to deceive; fraud is no part of the tort of passing off. Once it is shown that there is a likelihood of deception, continued user of the mark cannot be bona fide. It is no defence to the action that the mark consists of a name which is that of the defendant or manufacturer of the goods in question: see *per* Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead.*[3]

There is no exception to the rule that a person is not entitled to use his name as a mark in relation to goods if such user is likely to cause confusion: see *per* Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.*[4] Accordingly, since the defendants sold watches bearing a name which Danckwerts J. held might lead to some risk of confusion, he ought to have granted the injunction sought.

As to infringement, it is plain from section 68 of the Trade Marks Act, 1938, that the defendants, in using the name "Baume "& Mercier, Geneva," to indicate the origin of the goods in question, have thereby used a "trade mark" within the meaning of the Act. By the use of such name the defendants are in breach of section 4 (1) of the Act, since it so resembles the plaintiffs' registered trade mark as to be likely to deceive or cause

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"person having the right either as "proprietor or as registered user to "use the trade mark or to goods with "which such a person as aforesaid is "connected in the course of trade."

S. 8: "No registration of a trade "mark shall interfere with—(*a*) any "bona fide use by a person of his "own name or of the name of his "place of business, or of the name, "or of the name of the place of business, of any of his predecessors in "business; or (*b*) the use by any person of any bona fide description of "the character or quality of his goods, "not being a description that would "be likely to be taken as importing "any such reference as is mentioned "in paragraph (*b*) of subsection (1) "of section 4, or in paragraph (*b*) of "subsection (3) of section 37, of this "Act."

[3] (1913) 30 R.P.C. 493, 506.

[4] (1924) 41 R.P.C. 277, 291.

confusion in the course of trade. The defendants cannot claim the protection of section 8 of the Act as entitling them to use the name "Baume." The provisions of that section only protect a trader in the use of his own name if he uses it as the name of his business or on his stationery, invoices and the like; they do not protect him if he uses the name (assuming that there is likelihood of confusion) as a trade mark in respect of his goods. The opening words of the section operate as a proviso to section 4 (1) and were inserted ex abundanti cautela to show that the defence of bona fide user by a man of his own name which may be open to him in an action for passing off is also available to him in an action for infringement of a registered trade mark: see *per* Lord Radcliffe on the provision in the Jamaican Trade Marks Law (cap. 272) corresponding to section 44 of the Trade Marks Act, 1905 (the forerunner of section 8 of the Act of 1938) in *de Cordova* v. *Vick Chemical Co.*[5]

Danckwerts J. held that for the purposes of section 8 the defendants acted "bona fide" initially by putting the mark in question on their goods, but he did not consider the question whether, once it is shown to the knowledge of the defendants that confusion is likely to arise therefrom, continued user can be "bona fide" within the meaning of that section. It is submitted that it cannot and that, accordingly, section 8 affords no defence to the defendants, and that an injunction should be granted to prevent further infringement of the plaintiffs' trade mark. [Reference was also made to *Reddaway* v. *Banham*[6]; *Spalding (A. G.) & Bros.* v. *Gamage (A. W.) Ltd.*[7]; *Valentine Meat Juice Co.* v. *Valentine Extract Co. Ltd.*[8]; *Wright, Layman & Umney Ltd.* v. *Wright*[9]; *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris*[10]; *West Derby Union* v. *Metropolitan Life Assurance Society.*[11]]

Whitford following. The words "bona fide" in section 8 are meant to qualify the act done rather than the intention of the person acting. Bona fides is judged according to the user of the mark in question, that is, one looks at the nature of the use.

Sir Lionel Heald Q.C. and *F. E. Skone James* for the defendants. The plaintiffs are seeking, in effect, a monopoly in the word "Baume." Indeed, they go further and seek an injunction restraining any use of the word "Baume" with any other word or words. [Reference was made to *Cash (J. & J.) Ltd.* v. *Cash.*[12]]

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[5] (1951) 68 R.P.C. 103, 107; [1951] W.N. 195.

[6] [1896] A.C. 199, 204.

[7] (1915) 32 R.P.C. 284.

[8] (1900) 17 R.P.C. 673, 679, 680, 686, 688.

[9] (1948) 65 R.P.C. 185, 189, 190.

[10] (1933) 51 R.P.C. 98, 109.

[11] [1897] A.C. 647, 656.

On the question of infringement, section 8 of the Act of 1938, which is in similar terms to section 44 of the Act of 1905, should be construed in the light of the earlier provision. The observations of Lord Radcliffe in *de Cordova* v. *Vick Chemical Co.*,[13] relied on by the plaintiffs, are obiter. The words "bona fide" in section 8 are used in their ordinary meaning as well established in many fields to denote motive. The phrase is subjective and denotes the opposite of mala fides. There is no such thing in law as constructive good or bad faith. Accordingly, for the purposes of section 8 it is only material to consider the conduct of the defendants prior to the issue of the writ. [Reference was made to *Teynham (Lord)* v. *Mullins.*[14]] The author of Sebastian on the Law of Trade Marks, 5th ed., p. 392, did not look upon section 44 of the Act of 1905 (the precursor of section 8 of the Act of 1938) as a section inserted ex abundanti cautela but as a very important protection.

As to passing off, the evidence in support of the plaintiffs' contention that there is likelihood of confusion between their goods and those of the defendants is slender in the extreme. Strong reliance is placed on the judgment of Fry L.J. in *Turton* v. *Turton*[15] to reject the plaintiffs' contention that merely because there is a likelihood of a risk of confusion the court should automatically grant an injunction. The observations of Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead*[16] do not detract from the above proposition but merely go to show that a person has no absolute right to use his own name as a mark on goods. [Reference was also made to *Reddaway* v. *Banham*[17]; *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.*[18]; *Pianotist Co.'s Application*[19]; *Rysta Ltd.'s Application.*[20]]

Skone James following. The plaintiffs' contention as to the construction of section 8 would confine its operation to very narrow limits. Section 8 is intended to govern those cases where a name is used as a trade mark. As to passing off, the plaintiffs must produce evidence of the *fact* that there has been confusion, not that there is the likelihood of confusion: see *per* Brett L.J.

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[12] (1902) 19 R.P.C. 181.

[13] 68 R.P.C. 103, 107.

[14] (1674) 1 Mod. 119.

[15] (1889) 42 Ch.D. 128, 146.

[16] (1913) 30 R.P.C. 493, 510, 511.

[17] [1896] A.C. 199, 214.

[18] 41 R.P.C. 277, 291.

[19] (1906) 23 R.P.C. 774.

[20] (1942) 60 R.P.C. 87, 106.

in *Hendriks* v. *Montagu.*[21] Danckwerts J. in the present case has only found that there is a likelihood of confusion.

Aldous Q.C. in reply. The observations of Lord Radcliffe in the *de Cordova* case[22] are correct and avoid difficulties which would otherwise arise. The plaintiffs' argument comes to this: the name "Baume" has been registered as a trade mark since 1878 and the defendants have used the plaintiffs' mark in its entirety; the fact that other words have been added to it does not prevent it from being an infringement of the plaintiffs' mark; the use of the name "Baume & Mercier" by the defendants is an infringement of the exclusive right conferred on the plaintiffs by the first part of section 4 (1) of the Act of 1938.

As to passing off, there is ample evidence as to confusion. The propositions of law propounded in *Turton* v. *Turton*[23] and relied on by the defendants are not sound in view of the decision of the House of Lords in *Reddaway* v. *Banham.*[24] In any event, it was a trade *name* case where different considerations arise, as was emphasized in the judgments: see, for example, *per* Lord Esher M.R. and Cotton L.J.[25]

Sir Lionel Heald Q.C. in rejoinder. It is a revolutionary argument to say that the plaintiffs are given a monopoly by virtue of the first part of section 4 (1) of the Act of 1938. If the plaintiffs' contention be right as to the true meaning of that section, then section 8 ought to be construed liberally, otherwise it is useless and, indeed, is a trap.

Cur. adv. vult.

March 28. JENKINS L.J. The judgment about to be delivered by Romer L.J. is the judgment of the court.

ROMER L.J. This is an appeal from an order of Danckwerts J. dismissing the plaintiffs' action in which they sought an injunction restraining the defendants from infringing the registered trade mark of the plaintiffs and from passing off watches not being the goods of the plaintiffs as the plaintiffs' watches.

The plaintiffs' trade mark consists of the word "Baume" and it was registered in 1878 in Class 10 of Schedule III for watches and all other descriptions of horological instruments. They and their predecessors in title have carried on business in the sale of watches since 1834. The watches are made for them

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[21] (1881) 17 Ch.D. 638, 648, 649.

[22] 68 R.P.C. 103, 107.

[23] 42 Ch.D. 128.

[24] [1896] A.C. 199.

[25] 42 Ch.D. 128, 133, 142.

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by a firm in Switzerland called Mildia and are imported into this country and sold by the plaintiffs. It was admitted by the defendants that, since at least 1880, the plaintiffs' business of selling watches has been carried on by them or their predecessors under the trade mark "Baume"; that such business is a substantial one; and that for many years past substantial moneys have been expended in advertising.

The defendant company carry on business as watch importers and they sell directly to wholesalers. In about 1954 they entered into business relations with a Swiss Company called Baume & Mercier, Société Anonyme, of Geneva, and began to import watches made by that company into this country for sale. These watches are supplied by the defendants to wholesalers in boxes, on the outside of which is printed the name "Baume & Mercier "Geneva" and that name is also printed on the face of the watches themselves.

The plaintiffs' case, as pleaded by paragraph 5 of their statement of claim, is that "the use of the word 'Baume' as part of "the name of the watches advertised, offered for sale and sold "by the defendants is an infringement of the plaintiffs' said registered trade mark and it is further calculated to deceive and "cause confusion and to lead the trade and public to believe that "the goods offered for sale or sold by the defendants are goods of "the plaintiffs' manufacture or merchandise and is calculated to "pass off or enable others to pass off goods not of the plaintiffs' "manufacture or merchandise as and for the plaintiffs' goods."

In his judgment, the judge, after considering the evidence which had been called before him, said [1]: "In a matter of this "sort it is always rather difficult to see how far confusion really "is likely or possible, and what exactly the public will do, in the "absence of positive evidence of actual deception. On the whole, "I have come to the conclusion that the names are sufficiently "similar so that members of the public would not necessarily be "likely to perceive that 'Baume & Mercier' was not the same "as 'Baume,' and I think, therefore, that there is some "probability that confusion might occur in England in respect of "the sales of the watches." The judge, however, dismissed the action in so far as it was founded upon infringement of the plaintiffs' trade mark on the ground that the defendants were entitled to the protection afforded by section 8 of the Trade Marks Act, 1938; and, in so far as the plaintiffs' claim was based upon passing off, the judge dismissed it on the ground that there had been an honest user by the defendants of the makers' own name.

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[1] Ante, 137, 142; [1957] 3 All E.R. 416.

We first propose to consider the issue of passing off. It is quite clear on the evidence, and indeed from the defendants' admission to which we have already referred, that the name "Baume" has, for many years past, been associated in this country with the watches distributed by the plaintiffs. The questions on this part of the case would accordingly appear to be: (1) Have the plaintiffs established that the sale by the defendants of Baume & Mercier watches is reasonably calculated to cause confusion in the trade and in the minds of the public; and (2) If so, is it a valid defence for the defendants to show (as they did show to the judge's satisfaction) that there had been an honest use by them of the makers' own name? Taking the second question first, it is to be observed that this is not a case of a defendant carrying on a business under a name, but of marking goods with a name. The distinction between these two classes of case was emphasized and explained by Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.*[2] "It is the law "of this land," he said, "that no man is entitled to carry "on his business in such a way as to represent that it is "the business of another, or is in any way connected with the "business of another; that is the first proposition. The second "proposition is, that no man is entitled so to describe or mark "his goods as to represent that the goods are the goods of "another. To the first proposition there is, I myself think, an "exception: a man, in my opinion, is entitled to carry on his "business in his own name so long as he does not do anything "more than that to cause confusion with the business of another, "and so long as he does it honestly. It is an exception to the "rule which has of necessity been established. . . . To the second "rule, to which I have referred, I think there is no exception at "all; that is, that a man is not entitled so to describe his goods "as to lead to the belief that they are the goods of somebody "else. It is not necessary that there should be an exception to "that. It is perfectly legitimate for a man in the cutlery business "to carry on business under his own name whatever that name "may be, but I can see no necessity for his marking his cutlery "with a name (although it be his own name) which may have "the effect of passing off those goods as the goods of the "plaintiffs."

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[2] (1924) 41 R.P.C. 277, 291.

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Whether or not Romer J. may have expressed the exception to the first of the two rules too widely it is not necessary, for present purposes, to consider; but he said (quite rightly in our opinion) that there is no exception to the second rule and it is that rule which is relevant to the present case. In *Reddaway* v. *Banham*,[3] Lord Herschell, after referring to *Burgess* v. *Burgess*,[4] said[5]: "This, I think, clearly recognizes that a man may so "use even his own name in connexion with the sale of goods "as to make a false representation"; and see also *Valentine Meat Juice Co.* v. *Valentine Extract Co. Ltd.*[6]

The next point which arises is whether it is a valid defence to an action for passing off that the defendant had no intention to deceive. In our judgment, it is clearly not, for fraud is not a necessary constituent of such an action. This clearly appears from the judgment of Buckley L.J. in *John Brinsmead & Sons Ltd.* v. *Stanley Brinsmead.*[7] The Lord Justice, in laying down certain propositions with regard to passing off, expressed himself as follows[8]: "The law, as I understand it, is this:—if a man "makes a statement which is true, but which carries with it a false "representation and induces the belief that his goods are the "plaintiffs' goods, he will be restrained by injunction. He cannot "rely on the fact that his statement is literally and accurately "true, if, notwithstanding its truth, it carries with it a false representation. . . . Secondly, if it is found that a man's object "in doing that which he did was to deceive—that he had an "intention to deceive—the court will be very much more ready "to infer that his object has been achieved if the facts tend to "show that that is the case, and to say that his intention to "deceive ripening into deceit gives ground for an injunction; but "it is not necessary to prove intention to deceive. . . . If the "fact is that the act which the defendant is doing does deceive, "with the result that a man, who intends to be a customer of the "plaintiffs, is induced by something which the defendant has "done to become a customer of the defendant instead, even if "the defendant has done that innocently, yet as soon as he learns "that in point of fact that which he had no intention of using "for the purpose of deceit does create deception, then he is doing "that which is wrong, and he will be restrained from pursuing a "course of action the result of which is, in point of fact, to take

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[3] [1896] A.C. 199; 12 T.L.R. 295.

[4] (1853) 3 De G.M. & G. 896.

[5] [1896] A.C. 199, 211.

[6] (1900) 17 R.P.C. 673; 16 T.L.R. 522.

[7] (1913) 30 R.P.C. 493; 29 T.L.R. 706.

[8] 30 R.P.C. 493, 506, 507.

" that which is the plaintiffs' property and give it to him, to " defraud the plaintiffs' customers into becoming the defendant's " customers. Thirdly, in the application of the principles which " I have stated there is, in my opinion, no difference whatever " where the true statement consists in an accurate statement of " the defendant's name as distinguished from any other true " statement of fact, if of course you have evidence that from the " use of his own name deception results. If a trader takes a " name which is not his own name, but is that of a rival trader, " and uses it in his trade, no doubt that is very strong evidence " that he intends to deceive, and the court will fasten upon that " in any case in which it occurs; but if that is not so, if he is " simply using his own name and it is proved that its use results " in deception, he will be restrained even from using his own " name, without taking such steps as will preclude the deception " which, by hypothesis, is engendered by his using his own name. " There are many authorities for this proposition."

In our judgment, it follows from the second of the three principles enunciated by Buckley L.J. that the defence of innocent and honest user of the manufacturers' name on the watches which the defendants have sold will not avail them as a defence if the other ingredients of an action for passing off are established.

We turn, therefore, to the question whether the evidence which was called before the judge was such as to justify the view that the acts of which the plaintiffs complain were likely to cause deception. This is essentially a question of fact. In *Reddaway* v. *Banham*,[9] which was an action to restrain passing off, Lord Halsbury L.C. said: " My Lords, I believe in this case that the " question turns upon a question of fact. The question of law " is so constantly mixed up with the various questions of fact " which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult when " examining former decisions to disentangle what is decided as " fact and what is laid down as a principle of law. For myself, " I believe the principle of law may be very plainly stated, and " that is, that nobody has any right to represent his goods as the " goods of somebody else.

" How far the use of the particular words, signs or pictures " does or does not come up to the proposition which I have " enunciated in each particular case must always be a question " of evidence, and the more simple the phraseology, the more

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[9] [1896] A.C. 199, 204.

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"like it is to a mere description of the article sold, the greater "becomes the difficulty of proof; but if the proof establishes "the fact the legal consequence appears to follow."

[His Lordship then referred to the evidence and continued:] That concluded the evidence on the question of likelihood of confusion. Sir Lionel Heald contended before us that it was insufficient to afford a basis for an injunction against his clients. He relied on the fact that no case of actual confusion between the plaintiffs' watches and Baume & Mercier watches had been proved; that the only witnesses on the issue of likelihood of confusion called by the plaintiffs had been trade witnesses, and that notwithstanding that both the plaintiffs and Baume & Mercier had registered their names and trade marks in Switzerland, no evidence was before the court to show that any confusion had occurred in that country. He also contended that the fact that the plaintiffs' name was "Baume" simpliciter, whereas the offending name was the double name of "Baume & Mercier," was sufficient in itself to distinguish the one from the other, and that such distinction was emphasized by the word "Geneva" which follows upon "Baume & Mercier."

On the other hand, Mr. Aldous, in addition to relying upon the specific evidence of his witnesses (and in particular that of one Smitherman), pointed out that the plaintiffs' goods and Baume & Mercier watches are of similar quality and in the same general price range and are sold through the same shops and over the same counters; that the name "Baume" is an unfamiliar one in this country except as a trade name for watches; that it has been used in connexion with the plaintiffs' watches for 100 years and that every witness knew it well as a trade name for watches; and that there was some evidence before the judge that double names are usually referred to by their first names.

In our judgment, the considerations upon which Mr. Aldous relied, coupled with the witnesses whom the plaintiffs called, do establish a reasonable likelihood of confusion arising if the defendants continue to sell "Baume & Mercier" watches in this country. It appears to us that the evidence of the very experienced watchmaker and jeweller, Smitherman, was particularly cogent. He said, in effect, that he would not stock both Baume and Baume & Mercier watches in his shop because he thought that it would result in confusion both among his staff and through them, or independently of them, among the public. Evidence of a similar character was given by other of the plaintiffs' witnesses, though their evidence was admittedly not so strong as that of Smitherman. Notwithstanding the contrary views expressed by the witnesses called on behalf of the defendants, we are of opinion that there is a real probability of the Baume & Mercier watches being regarded in the shops as being the same as, or in some way associated with, the plaintiffs' goods, and that the plaintiffs have accordingly made good their case in so far as they found it upon passing off; and that an injunction should be granted accordingly.

Inasmuch as it is a matter of indifference to the plaintiffs whether they obtain an injunction against passing off or an injunction against infringement of trade mark, so long as they are granted either one or the other, it becomes in strictness irrelevant to consider, or adjudicate upon, the arguments which were addressed to us on the trade mark aspect of the case. As, however, several points were raised and argued before us upon the subject, we will briefly express our provisional views upon them.

The sections of the Trade Marks Act, 1938, which are relevant to the matter are section 4 (1) and section 8. [His Lordship read them and continued:] It is convenient also to refer to the definition of "mark" and "trade mark" in section 68 of the Act, which provides: "'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof"; and "'trade mark' means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connexion in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 37 of this Act."

The first question to be considered is whether the defendants, in using the name "Baume & Mercier, Geneva," as a mark indicating the origin of the goods which are in question in this case, have infringed the plaintiffs' right to the exclusive use of the trade mark "Baume"; and, inasmuch as "Baume & Mercier, Geneva," is not identical with "Baume," the answer to the question depends on whether "Baume & Mercier, Geneva," nearly resembles "Baume" in the manner mentioned in section 4 (1). In our view, this question must be answered in the affirmative, inasmuch as the defendants have incorporated the whole of the plaintiffs' registered mark, and the addition of the words "& Mercier, Geneva," does not avoid the prohibited resemblance.

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The defendants have undoubtedly used the "essential feature" of the plaintiffs' mark. (Compare the observations of Lord Radcliffe in *de Cordova* v. *Vick Chemical Co.*,[10] and see also *Saville Perfumery Ltd.* v. *June Perfect Ltd.*[11]) Accordingly, and having regard to the views which we have expressed earlier in this judgment as to the likelihood of confusion, the defendants are in the position of infringers of the plaintiffs' trade mark unless they are entitled to the protection of section 8 of the Act of 1938.

Mr. Aldous, for the plaintiffs, contended before us that they are not. His argument, in summary, was that the section only protects a trader in the use of his own name if he uses it as the name of his business or on his stationery, invoices, etc., and that it does not protect him if he uses the name (assuming the likelihood of confusion) as a trade mark in respect of his goods; that the section was introduced into the Act ex abundanti cautela to show that the defence of bona fide user by a man of his own name as a business name which may be open to him in a passing off action is also available to him in an action for infringement of a registered trade mark. Mr. Aldous's contention on this point would appear to have the support of a dictum of the Privy Council in *de Cordova* v. *Vick Chemical Co.*[12] The Judicial Committee in that case was considering a section of the Jamaican Trade Marks Law which was the same, so far as relevant, as section 44 of the Trade Marks Act, 1905 (which was the forerunner of section 8 of the Act of 1938), and Lord Radcliffe said [13]: "There "is nothing in the section to suggest that it is directed specifically, if it is directed at all, towards protecting use by a person "of a name or place of business or description by way of a trade "mark."

The expression of this view was, however, in no way necessary to their Lordships' decision, and for ourselves we find some difficulty in accepting it. Section 8 (*a*) is expressed in perfectly general terms, and we can see no sufficient warrant for confining its operation to the bona fide use by a trader of his own name as a trade name as distinct from using it as a trade mark. We do not accept Mr. Aldous's suggestion that section 8 (the provisions of which were enacted in a somewhat narrower form by section 44 of the Trade Marks Act, 1905) was introduced merely ex abundanti cautela. It seems to us that its object was to ensure that the use by a man of his own name should be protected, provided that the user was bona fide, whether he traded under that name or whether he used it as a trade mark in respect of his goods; and, if the narrower interpretation for which Mr. Aldous contends is attributed to the section, it is difficult to apprehend the purpose of Parliament in enacting it at all. We would only add that the construction of the section which seems to us to be the right one is in conformity with the view which Farwell J. apparently took of the effect of section 44 of the Act of 1905 in *C. & T. Harris (Calne) Ltd.* v. *F. S. E. Harris.*[14]

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[10] (1951) 68 R.P.C. 103, 105, 106; [1951] W.N. 195.

[11] (1941) 58 R.P.C. 147.

[12] 68 R.P.C. 103.

[13] Ibid. 107.

The next point which was discussed before us was as to the meaning of "bona fide" used in section 8. Danckwerts J. said[15] that he understood that "bona fide" normally "means the "honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use "of the goodwill which has been acquired by another trader": and in that sense he acquitted the defendants of any want of bona fides in the present case. We agree with the judge's definition of the term "bona fide" and we see no reason to attribute a different or special meaning to the phrase in its context in section 8. The mere fact in itself that a trader is using his own name which too closely resembles a registered trade name of which he is aware, does not prevent the user from being "bona "fide," provided that the trader honestly thought that no confusion would arise, and if he had no intention of wrongfully diverting business to himself by using the name. The truth is that a man is either honest or dishonest in his motives; there is no such thing, so far as we are aware, as constructive dishonesty. In our judgment, if a trader is honestly using his own name, then no action will lie for infringement of trade mark, and any rival trader who thinks himself aggrieved must sue, if at all, for passing off.

We would accordingly hold, were it necessary to do so, that the defendants were entitled to rely on section 8 of the Act as a defence to a claim for infringement, having regard to the finding of the judge that they acted in good faith.

A final point which emerged at a somewhat late stage of Mr. Aldous's submissions was that the use of the name "Baume "& Mercier" by the defendants was an infringement of the "exclusive right" conferred on the plaintiffs by the first part of section 4 (1) of the Act of 1938 to use their registered mark "Baume," whether or not such user was "likely to deceive or

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[14] (1933) 51 R.P.C. 98; 50 T.L.R. 123.

[15] Ante, 137, 145.

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"cause confusion." The point clearly does not arise in the present case, for the judge found (and we agree with him) that the plaintiffs had established likelihood of confusion. We prefer, therefore, to express no opinion on the point, but would merely say that, if Mr. Aldous is right in his submission, it would seem to afford solid ground for adopting a wide construction of section 8.

In the result, we are of opinion, for the reasons stated earlier in this judgment, that the plaintiffs are entitled to succeed on the issue of passing off in this action, and that the appeal should, accordingly, be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Cummings, Marchant & Ashton; Stollard & Limbrey.*

J. A. G.

1958
July 14.

Danckwerts and Upjohn JJ.

In re COOPER (A Bankrupt). *Ex parte* THE TRUSTEE *v.* REGISTRAR AND HIGH BAILIFF OF PETERBOROUGH AND HUNTINGDON COUNTY COURTS.

[No. 18 of 1957.]

Bankruptcy — Execution — Costs — Sheriff — Execution on goods after receiving order—Goods returned—Costs of execution—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 26—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 40, 41.

The sheriff's officer on July 4, 1957, attempted to levy execution on two tractors of a debtor pursuant to two warrants of execution issued to judgment creditors. He left forms with an employee of the debtor stating that execution had been levied, and also gave the employee two forms asking the debtor to agree to a "walking "execution."

On July 10 the debtor was adjudicated bankrupt on his own petition and a receiving order was made the same day. On July 11 the sheriff's officer, not having received notice of the bankruptcy, took possession of the tractors, two transporters having been sent for that purpose under arrangements made by the clerk to the county court. On July 12 the official receiver asked for the return of the tractors and they were returned. The costs of the execution, amounting to some £70, were allowed by the county court judge, who found that the registrar and high bailiff was entitled to the protection of section 41 of the Bankruptcy Act, 1914,[1] in respect of these executions.

On appeal from that order by the bankrupt's trustee in bankruptcy:—

Held, (1) that, assuming that the only taking in execution was on July 11, the provisions of section 41 (1) applied, although the execution took place after the date of the receiving order, and that, accordingly, the costs of the execution were a first charge on the bankrupt's property and the claim for them had been rightly allowed.

(2) *Per* Danckwerts J., that it was a question of fact whether a seizure was an effective execution; in the present case the acts done on July 4 (which was before the adjudication) did amount to an effective execution, and subsequent events entirely negatived any intention to abandon possession.

Lumsden v. *Burnett* [1898] 2 Q.B. 177; 14 T.L.R. 403 applied.

APPEAL from Judge W. Lawson Campbell sitting at Peterborough County Court.

The following statement of facts is taken from the judgment of Danckwerts J.: Two judgment creditors of the debtor obtained warrants of execution on May 15 and June 11, 1957, which were duly delivered to the sheriff for execution. They were in different county courts: one was in Huntingdon County Court and the other was in the Biggleswade County Court.

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[1] Bankruptcy Act, 1914, s. 40: "Where a creditor has issued execution against the goods or lands of "a debtor, or has attached any debt "due to him, he shall not be "entitled to retain the benefit of the "execution or attachment against the "trustee in bankruptcy of the debtor, "unless he has completed the execution or attachment before the date "of the receiving order, and before "notice of the presentation of any "bankruptcy petition by or against "the debtor, or of the commission of "any available act of bankruptcy by "the debtor." S. 41 (1): "Where "any goods of a debtor are taken in "execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of "the full amount of the levy, notice "is served on the sheriff that a "receiving order has been made "against the debtor, the sheriff "shall, on request, deliver the goods "and any money seized or received in "part satisfaction of the execution "to the official receiver, but the costs "of the execution shall be a first "charge on the goods or money so "delivered and the official receiver "or trustee may sell the goods, or "an adequate part thereof, for the "purpose of satisfying the charge."

Sale of Goods Act, 1893, s. 26: "A writ of fieri facias or other writ "of execution against goods shall "bind the property in the goods of "the execution debtor as from the "time when the writ is delivered to "the sheriff to be executed; and, for "the better manifestation of such "time, it shall be the duty of the "sheriff, without fee, upon the "receipt of any such writ to endorse "upon the back thereof the hour, "day, month, and year when he "received the same: Provided that "no such writ shall prejudice the title "to such goods acquired by any "person in good faith and for "valuable consideration, unless such "person had at the time when he "acquired his title notice that such "writ or any other writ by virtue of "which the goods of the execution "debtor might be seized or attached "had been delivered to and remained "unexecuted in the hands of the "sheriff."

On July 4, 1957, the sheriff's officer proceeded to effect an execution if he could. He went to the debtor's farm where he had made repeated attempts to find the debtor at home and had been unsuccessful; on this occasion, intending to levy execution on two caterpillar tractors, he handed to an employee of the debtor forms stating that execution had been levied on the two tractors, although the tractors were not removed. He also handed to the same employee two forms inviting the debtor to agree to a walking execution.

On July 10, 1957, the debtor filed his own petition in bankruptcy and a receiving order and order of adjudication were all made the same day. On July 11 the sheriff's officer, in good faith, because no news of this had reached the sheriff, went back to the farm and proceeded to seize the two tractors and have them carried away on two transporters. These transporters arrived under arrangements made by the clerk to the county court on information received from the sheriff's officer on July 4, when the clerk immediately made arrangements with an appropriate firm to remove the tractors and, accordingly, these transporters arrived on July 11 and removed the tractors in question.

On July 12 the official receiver asked for the return of the tractors and they were returned. On August 6 a letter was written asking for payment of the sheriff's costs of the execution which amounted to something over £70, because there had been the expensive arrangements made for removing the tractors.

The question of costs was brought before the county court judge for Peterborough and Huntingdon on March 4, 1958; and on March 10, 1958, there was a hearing in chambers before him. On April 17, 1958, he made an order that the registrar and high bailiff was entitled to the protection afforded by section 41 of the Bankruptcy Act, 1914, relating to the execution, and directed that such costs should be taxed by the registrar of the Cambridge County Court and paid by the trustee of the bankrupt out of the assets of the bankrupt. The trustee appealed from that order.

B. J. H. Clauson for the trustee in bankruptcy. The trustee appeals against the finding that section 41 of the Bankruptcy Act, 1914, applies to the costs of this seizure which took place after bankruptcy. The effect of the sheriff's writ is to bind the goods (see Halsbury's Laws of England, 3rd ed., vol. 16, p. 43); but although the sheriff originally had the right to seize the goods, he acquired no property in them, and once they vested in the trustee in bankruptcy his right of seizure ceased. *Ex parte Williams, In re Davies*[2] is almost on all fours with this case except that the sheriff in that case acted with greater dispatch. Where a sheriff seized goods after an act of bankruptcy he was held liable in trover: *Balme* v. *Hutton*.[3] That case is relied on as showing clearly that once there is a bankruptcy the sheriff is powerless and cannot seize the goods.

What took place on July 4 was not an effective execution; for an execution to be effective it must be continuous. The goods here were seized by the sheriff, but possession was immediately withdrawn. After seizure under the writ it is the sheriff's duty to retain possession until sale. If he abandons possession of the goods they are no longer subject to the writ unless he can show that the abandonment was not intended, and, if the absence is not satisfactorily explained, abandonment will be presumed: see Halsbury, p. 56, and *Ackland* v. *Paynter*.[4] Whether possession is abandoned is a question of fact. Here all that the sheriff did was to leave four forms and go away for a week; there was nothing to show that execution was intended to be levied on the two tractors. That is not enough to constitute possession; there may have been possession, but it was immediately abandoned: see *Bagshawes* v. *Deacon*,[5] which supports the judgment of Graham B. in *Ackland* v. *Paynter*[6] and is binding on this court.

[UPJOHN J. I am not sure that you ought to concede that there was a good execution.]

I do not abandon the point that it was not a good execution, but, even if it were, it was not enough, because the sheriff never left anyone in possession and it was abandoned.

When the receiving order and bankruptcy took place there was no effective seizure and the property then vested in the trustee. The seizure thereafter was wrongful and section 41 of the Bankruptcy Act, 1914, does not apply in this case. That section is to be read with section 40 when there is a seizure preceding the bankruptcy; the Act does not cover this case when there is a bankruptcy before the seizure. [Reference was made to the Bankruptcy Rules, 1952, r. 327, and Williams on Bankruptcy, 17th ed., p. 673.]

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[2] (1872) L.R. 7 Ch. 314.

[3] (1833) 9 Bing. 471.

[4] (1820) 8 Price 95.

[5] [1898] 2 Q.B. 173.

[6] 8 Price 95.

Denys Buckley for the Registrar and High Bailiff of Peterborough and Huntingdon County Courts. What was done on July 4 was sufficient to constitute a seizure of the goods; any entry on premises where the goods are situate together with an intimation of an intention to seize them amounts to a valid seizure: see Halsbury, p. 55. *Lumsden* v. *Burnett* [7] supports the submission that the sheriff does not abandon possession merely by going away; the question is whether what he has done amounts to abandonment of possession. The facts of that case are analogous to the present. The evidence here discloses an intention to levy execution on the two tractors, and the notes made thereon were on the footing that the warrants were executed that day. Such facts do not amount to abandonment. It is what is known as "walking possession," i.e., when the sheriff leaves the premises without any intention to abandon possession; it is in contrast with close possession. It is a practice which has developed in recent years because of the shortage of possession men.

On the question whether the judgment creditor has to pay the costs of the levy, he was only doing what the law allows in ignorance of the intervening receiving order. The receiving order does not put an end to the right of seizure. If the receiving order were discharged the judgment creditor would be perfectly entitled to levy execution under the warrant, which would still be valid. Even after adjudication if the trustee disclaimed certain goods the judgment creditor could still levy against them, and the fact that for the time being their ownership had vested in the trustee would not alter his rights. If goods were seized while the bankruptcy subsisted the sheriff would have to account for them to the trustee.

There is no disagreement between the Bankruptcy Act, 1914, and the Sale of Goods Act, 1893; section 7 of the Act of 1914 relates to the effect of the receiving order on the goods of the debtor, but the binding effect of the warrant under section 26 of the Act of 1893 lasts subject to any fetter put on it by the receiving order. The right under section 26 is not effective against a purchaser for value without notice, when the chain under the warrant is broken; but where the goods have vested in the trustee the chain is not broken although the goods are subject to the fetter of the trustee's rights and duties. Thus, when the receiving order is made, the chain under the warrant is not broken, although it is subject to any modification necessary to fit in with the bankruptcy legislation. It was therefore perfectly lawful to levy execution after the receiving order was made although it was not an execution of which the judgment creditor could take the benefit. Therefore, even if execution was not levied until July 11 and the adjudication was on July 10, it would not be any the less under the warrant, though not for the creditor's benefit: see section 55 (1) of the Act of 1914. The execution being therefore under the warrant, section 41 (1) of the Act is applicable and the sheriff is entitled to the costs of the execution as a first charge on the goods.

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[7] [1898] 2 Q.B. 177; 14 T.L.R. 403.

Clauson in reply. *Lumsden* v. *Burnett*[8] is quite a different case from this; there the tax collector went back every day to see if the goods were still on the premises; no explanation has been given here why the execution was not kept alive; it is a much weaker case than *Lumsden* v. *Burnett*.[8] No attempt has been made to distinguish *Ex parte Williams, In re Davies*,[9] which is indistinguishable from the present and is binding on the court.

DANCKWERTS J. This case raises some interesting points in the law of bankruptcy. It relates to the bankruptcy of a farmer, and the sequence of events appears to be as follows. [His Lordship having stated the facts continued:]

Two questions arise. One is purely a question of fact; the other is a more interesting question of law: Was there an effective seizure in execution on July 4 in the circumstances of this case?

It appears from the cases that it is not necessary that the actual goods be taken into possession by the sheriff's officer. Also it is not necessary that he should retain possession of the goods. What is known as a "walking possession" has become rather more common than it used to be in the old days because of the difficulty of getting appropriate persons to remain in possession of the goods, largely, perhaps, because of the economic situation. There is certainly one authority which shows that very little in the way of actual seizure would be sufficient to satisfy the requirements of delivery in execution. I refer to *Lumsden* v. *Burnett*.[1] That was a case of a distress in respect of income tax where the distress was claimed to have been levied on eight pairs of trousers which were never actually taken into possession by the officer nor did he retain possession of them. He received a document signed by a girl of 13 which was, of course, of no value whatever. But, none the less, it was held that he had effected execution and that the execution had not been abandoned although the most that the officer did was to go and visit the premises occasionally to see whether the goods on the premises had been removed. The point of that case was a different one, of course: Whether in the circumstances the income tax authorities could charge half-a-crown a day on the footing that the bailiff had been in possession, which, of course, in actual fact he had not and, therefore, it was held that they could not recover the half-a-crown a day. But it does indicate the way in which very simple acts would be sufficient to satisfy the requirements of the taking and retaining of possession. But it is, in each case, a question of fact, and the abandonment of possession, if possession had been taken, is also a question of fact. In the present case, in my view, the requirements were sufficiently satisfied by the sheriff's officer coming upon the farm and indicating to an employee of the debtor that he was levying an execution on these two tractors. Subsequently, it seems to me that the events entirely negatived any intention to abandon possession which was originally taken, because everything was consistent with completing the process of execution: the sheriff's officer informing the clerk to the court, the clerk to the court making the arrangements for the taking away of the tractors, and the final removal of the tractors on July 11 in pursuance of those arrangements.

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[8] [1898] 2 Q.B. 177.

[9] L.R. 7 Ch. 314.

[1] [1898] 2 Q.B. 177; 14 T.L.R. 403.

I should be prepared to find, if I had to decide the case on that ground, that there was a taking in execution on July 4, 1957. But there was also the other point which arises on the footing that the only taking in execution was on July 11. That was, of course, after the receiving order and after the adjudication which had been made the preceding day, although no notice of that had reached the sheriff before. It has been argued on behalf of the trustee in bankruptcy that any title by execution in those circumstances cannot prevail over the title of the trustee in bankruptcy in whom the property vested under the provisions of the Bankruptcy Act, 1914, on the adjudication in bankruptcy. The legal position is that the effect of the execution primarily depends on section 26 of the Sale of Goods Act, 1893. [His Lordship read section 26 of the Act of 1893.] The effect of that would seem to be that the title or right given by virtue of the writ remains effective not only against the goods in the hands of the original debtor but also against any transferee other than a purchaser in good faith and for value. Therefore, prima facie, it would have appeared that the writ would be effective against the trustee in bankruptcy who, of course, does not give value but merely claims title by process of law.

Mr. Clauson, on behalf of the trustee, relied on *Ex parte Williams, In re Davies*,[2] which was decided on section 12 of the Bankruptcy Act, 1869, and supports the argument to some extent. That, of course, was on a different section of a different Act and it referred to adjudication and not the making of a receiving order, although the provisions in that section in the Act of 1869 resemble more the provisions in regard to the effect of a receiving order in section 7 of the Bankruptcy Act of 1914. Section 7 of the Bankruptcy Act, 1914, provides by subsection (1): "On the making "of a receiving order an official receiver shall be thereby con- "stituted receiver of the property of the debtor, and thereafter, "except as directed by this Act, no creditor to whom the debtor "is indebted in respect of any debt provable in bankruptcy shall "have any remedy against the property or person of the debtor "in respect of the debt, or shall commence any action or other "legal proceedings, unless with the leave of the court and on such "terms as the court may impose." Then subsection (2) provides for the position of a secured creditor, which is irrelevant for this purpose. That section does not in fact say: "Subject to the "provisions of this Act," but one must obviously infer that because it is all part of the same Act. One turns, therefore, to sections 40 and 41 which are headed: "Effect of bankruptcy on "antecedent and other transactions." Section 40 deals with a completed execution. [His Lordship read section 40 (1).] The result of that is that incompleted executions are ineffective and the property has to be brought into the bankruptcy. But, of course, completed executions, by inference, are protected against the effect of the bankruptcy and the benefit is then retained by the execution creditor.

It seems to me that section 41 is concerned with a different situation and that is where the execution has not been completed. It is, of course, on the second part of that subsection that the respondent in the present case relies. It seems to me that Mr. Buckley is right when he suggests that the provisions of that subsection may well refer to an execution which has been taken, or the taking of goods of a debtor in execution, after the date of the receiving order because it refers to "notice being given of a

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[2] (1872) L.R. 7 Ch. 314.

"receiving order having been made," and, of course, it applies equally well to a case where the taking of the goods of a debtor has been before the date of the receiving order but where the execution has not been completed. It refers equally well to both situations and I think that the provision is intended to produce a fair result where in complete ignorance the sheriff or his officer have proceeded in execution not knowing that any receiving order has been made at all, or at any rate, not having received any notice in writing that a receiving order had been made.

Consequently the terms of this section do apply to the present case where the taking in execution was made on July 11, and not before, in complete ignorance of the making of the receiving order and adjudication. The section does, therefore, give the judgment creditor the right to have his costs provided for out of the property of the bankrupt in the circumstances which have arisen. So I think that the appeal must fail on both the grounds which I have mentioned.

Upjohn J. I agree that this appeal fails.

As Danckwerts J. has said, two points arise. The first is purely a question of fact, that is, whether the sheriff or the bailiff effectively seized the two tractors on July 4 and, if he did so, whether before the date of adjudication he abandoned possession of those tractors. I think that is a very difficult question of fact and with all respect to the judgment which has just been delivered I must not be taken as assenting to it upon this part of the case. I find it unnecessary in fact to express any conclusion on it because I agree with what Danckwerts J. has said in regard to the second point, that is to say, whether there was an effective seizure on July 11 under section 41, effective, that is, to the extent that the judgment creditor should have a claim under that section for the costs of the seizure.

Mr. Clauson invited us to take the view that section 41 had no application because when the seizure was made on July 11 the goods in question were no longer the goods of the debtor; therefore they had vested, he argued, in the official receiver. No doubt they had, but that circumstance, in my view, is irrelevant. As Danckwerts J. has pointed out, the right to seize given by section 26 of the Sale of Goods Act, 1893, remains valid and effective against everyone but a purchaser for value without notice. Therefore the fact that the goods have vested in the official receiver matters not, so far as the vesting provisions are concerned; the bailiff would still have a prior right to seize.

I therefore accept Mr. Buckley's argument that one must look at section 7 and sections 40 and 41 to see how far, if at all, the right to seize is effective. It is quite plain from section 40 that, as the execution was not completed before the date of the receiving order, it must be treated as being for the benefit of the bankruptcy. But in section 41 it is significant that the test changes. Section 40 starts: "Where a creditor has issued execution." In section 41 there is this: "Where any goods of a debtor are taken in execution," and "and before the sale thereof . . . notice is served . . . that a receiving order has been made." I agree with Danckwerts J. in thinking that the terms of this section are applicable to an execution before or after a receiving order or adjudication made in ignorance thereof. All that is required is that if goods are taken in execution after the making of a receiving order and a notice is served on the sheriff that a receiving order has been made, certain results flow. One is that the sheriff must hand over any goods or proceeds of sale. But the section provides that he is to have this benefit, that the costs of the execution are to be a first charge on the goods or money so delivered.

I agree therefore that this appeal fails.

Order accordingly.

Solicitors: *Kingsford, Dorman & Co., for Buckle & Co., Peterborough; Treasury Solicitor.*

I. G. R. M.

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MORTGAGE—*Attornment clause—Notice to quit—Four weeks' notice required by statute to quit premises let as a dwelling—Whether applicable to mortgagor under attornment clause—Rent Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

Landlord and Tenant — Rent restriction — Notice to quit—Premises let as a dwelling—Statutory requirement of four weeks' notice—Whether applicable to mortgagor under attornment clause—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

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PASSING OFF — *Risk of confusion — Bona fide use of own name on goods — Whether defence.*

Trade Mark—Infringement—Bona fide use of own name, defence of—Whether applicable to use as a trade mark—Risk of confusion—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 4 (1), 8 (*a*).

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2. ——. See Trade Mark.

POWER OF APPOINTMENT — *General power—Exercise—Will—No reference to power in residuary gift — Reference to two other powers in will — No expression of contrary intention — Whether first power exercised — Wills Act*, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27.

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2. —— *Hybrid power—Delegation—Power neither special nor general—Power to appoint with consent of trustees and to any person or persons with two named exceptions—Whether capable of delegation.*

In re Triffitt's Settlement. Hall *v.* Hyde - - - - - **Upjohn J. 852**

3. ——. See Conflict of Laws.

RATES AND RATING—" *Religion* "—*Moral virtue* — " *Education* " — " *Social welfare* "— *Theosophical Society — Objects of society not wholly charitable — Written constitution — Whether activities relevant in ascertaining " main objects "—Rating and Valuation* (*Miscellaneous Provisions*) *Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

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2. —— *Social welfare — Health — Council required by statute to maintain register of nurses—Claim for rating relief—Advancement of " social welfare "—Meaning—Rating and Valuation* (*Miscellaneous Provisions*) *Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

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RESTRICTIVE COVENANT—*Enforceability —Transfer of benefit — Absence of building scheme, words of annexation or complete chain of assignments — Whether fourth method of transfer.*

In re Pinewood Estate, Farnborough **Wynn-Parry J. 280**

RESTRICTIVE PRACTICE—*Registration—Agreements registrable — Motor-car manufacturers—Restrictive trading agreements—Agreements between company and their distributors and dealers — Multipartite agreements — Liability of existing agreements to registration—*

RESTRICTIVE PRACTICE—*continued.*

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In re Austin Motor Co. Ltd's Agreements **Upjohn J. 61**

REVENUE—*Estate duty—Contribution to—Deferred pecuniary legacies—" Free of duty "—Liability to estate duty—Prior successive life interests—Whether legatees liable to contribute towards duty paid on the first death—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 8 (4), 9 (1), 14 (1).

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2. —— *Estate duty — Property chargeable — Disclaimer of specific legacies — Disclaimer within five years of death of disclaimant — Resulting benefit to residuary legatees — Liability to estate duty on death of disclaimant —Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 45.

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3. —— *Estate duty—Property chargeable—Property deemed to pass—Insurance policy—" Wholly kept up . . . for the benefit of a " donee . . ."—" Kept up "—All premiums paid 34 years before death of assured—Policy partly mortgaged to insurance company — Whether duty payable on whole of policy moneys — Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38 (2)—*Customs and Inland Revenue Act*, 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11 (1)—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*c*).

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4. —— *Estate duty — Property chargeable—Property passing on death—Bequest to trustee for life of income from share of residue—" . . . so long as he shall act as . . . " trustee . . . by way of remuneration "—Duty claimed on death of trustee on capital of share—Whether exempted as income received " only . . . as holder of an office "—Scope of exempting provisions—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

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5. —— *Income tax — Balancing charge — " Actual income " — Whether balancing charge part of " actual income " for company surtax purposes—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323.

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6. —— *Income tax—Basis of assessment—Case VI — Whether payments assessable in respect of year in which received or year in respect of which they were paid—Meaning of " arising "—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI, r.* 2.

Revenue—Income tax—Crown—Payments by —Whether Case III can apply—Crown immunity — Income Tax Act, 1918, *r.* 21, *of General Rules, Sch. D, Case III, r.* 1 (*a*).

Revenue—Income tax—" Annual payment " —Coal nationalization—Interim income payments — Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22—*Coal Industry (No. 2) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*), *Case VI, r.* 2.

Revenue—Income tax—" Interest of money " —Statutory payment calculated as sum equal to interest on compensation to which it is added — Coal Industry Nationalization Act, 1946, *s.* 22 (2) (*a*)—*Income Tax Act*, 1918, *Sch. D, Case III, r.* 1 (*a*).

Mines and Minerals—Coal—Nationalization —Compensation—Interim income payments—Whether to be included in actual income of year of receipt or of year or period in respect of which it was paid—Coal Industry Nationalization Act, 1946, *s.* 5 (1).

Inland Revenue Commissioners *v.* Whitworth Park Coal Co. Ltd. (In Liquidation) **C.A. 792**

7. —— *Income tax—Discontinuance of trade or profession — Author — Death — Royalties—Royalties paid after author's death arising from contracts made by him—Whether assessable to income tax—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, III, VI.*

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8. —— *Income tax—Double taxation relief —Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom—Assessments to income tax on life fund interest — Competence of assessments — " Industrial or commercial profits "—Whether taxable surpluses properly so described—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. I, Sch. D, rules applicable to Case III, r.* 3—*Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1

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Eliz. 2, *c.* 10), *s.* 430—*Double Taxation Relief (Taxes on Income) (Australia) Order*, 1947 (*S.R. & O.*, 1947, *No.* 806), *Sch.*, *art. II* (1) (*i*) (3); *art. III* (2) (3).
Ostime (Inspector of Taxes) *v.* Australian Mutual Provident Society - **Upjohn J. 774**

9. —— *Income tax—Settlement—Surrender—Wife's surrender of life interest to children—Whether disposition—Whether "settlement"—Husband assessed in respect of income paid by trustees to infant children of wife's former marriage—Finance Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21 (1) (9).
Inland Revenue Commissioners *v.* Buchanan - - - - - - - **C.A. 289**

10. —— *Profits tax—"Controlling interest"—Body corporate a shareholder—Whether register of members sole test of shareholding—Finance Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV*, *para.* 11—*Finance Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 34.
G. Berendsen Ltd. *v.* Inland Revenue Commissioners - **Wynn-Parry J. and C.A. 1**

11. —— *Stamp duty — Conveyance or transfer on sale—Oral agreement for sale of reversionary interest to tenant for life—Subsequent deed of transfer—Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*), (2)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54.
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12. —— *Stamp duty—Conveyance or transfer on sale — Transfer by two documents — Agreement to sell shares and deed of transfer—Consideration payable over* 125 *years—Whole amount due if instalment not paid—Whether duty on agreement as "primary security for ". . . sums of money at stated periods"—Whether duty on transfer payable on whole amount ultimately transferable—Interest on stamp duty repaid—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 13 (1) (4), 56 (2) (4), *Sch. I*, *para.* 1—*Law Reform (Miscellaneous Provisions) Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3.
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13. —— *Stamp duty — Gifts inter vivos — Oral settlement—Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

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14. —— *Stamp duty — Gifts inter vivos — Settlement — Oral agreement for value for transfer of reversionary interest to tenant for life — Subsequent deed of transfer — Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*) (2)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54.
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15. —— *Stamp duty — Gifts inter vivos — Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74.
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SETTLEMENT—*Construction—Acceleration—Will—Devise to A. for life with remainder to his sons in tail male, with remainder to C. in fee simple—A. disclaims, having had as yet no son — Disposal of intermediate income — Whether income expressly disposed of—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 175 (1).
Will—Intermediate income.
In re Hatfield's Will Trusts. Hatfield *v.* Hatfield - - - - **Harman J. 469**

SOLICITOR—Treasury Solicitor. See Local Government.

STATUTE — Construction — Absurdity. See Administration of Estates.

TOWN AND COUNTRY PLANNING—*Compensation—Land held on trust for sale—Compensation not to be treated as proceeds of sale arising under trust for sale—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 28 (1)—*Settled Land Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 58 (1)—*Town and Country Planning Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 66 (1)—*Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations*, 1955 (*S.I.* 1955, *No.* 38), *reg.* 10.
*Trust and Trustee — Variation of trusts — Infant tenant in tail in remainder—Proposal that infant's entailed interest be sold to tenant

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for life and purchase price be paid to trustees of new settlement for the infant's benefit—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 53.
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2. —— *Infringement — Bona fide use of own name, defence of — Whether applicable to use as a trade mark—Risk of confusion —Trade Marks Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 8 (*a*).
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2. —— Counsel's fees. See COSTS.

3. —— Life interest in share of residue as remuneration. See REVENUE.

4. —— *Protective trust—Forfeiture clause —Maintenance charged on protected interest by order of court—Trustee Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 33.
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6. ——. See TOWN AND COUNTRY PLANNING.

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2. —— Construction. See REVENUE.

3. —— *Election—Disposition after will — Disposition by will of freehold property and residuary estate to seven beneficiaries — Subsequent effective contract to devise freehold property to one beneficiary—Whether specific devise adeemed—Whether beneficiary required to elect—Wills Act*, 1837 (7 *Will* 4 *&* 1 *Vict. c.* 26), *s.* 24.
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4. ——. See CONFLICT OF LAWS.

5. ——. See POWER OF APPOINTMENT.

6. ——. See SETTLEMENT.

ERRATUM

[1958] Ch. 61. *For* " Austin Motor-Car Co. Ltd.'s Agreements," *read* " The Austin Motor Company Ltd.'s Agreements."

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